Nos. 87-1697 and 87-1711

In The
Supreme Court of the United States
October Term, 1987

STANLEY WILKINSON,

AND

COUNTY OF YAKIMA,

Petitioners,

vs.

CONFEDERATED TRIBES AND BANDS OF THE YAKIMA INDIAN NATION,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

CONSOLIDATED BRIEF OF RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1) Does the Yakima Indian Nation have inherent power to provide comprehensive land use and zoning regulations for the non-incorporated lands of the Yakima Indian Reservation?

2) Does Yakima County threaten the political integrity or economic security of the Yakima Indian Nation by imposing its land use and zoning regulations on the non-incorporated fee lands of the Yakima Indian Reservation owned by non-members which regulations disrupt the comprehensive land use plan and regulations of the Yakima Indian Nation?

3) Was the Court of Appeals correct in determining that Yakima County's efforts to provide ultimate land use and zoning regulation to non-Indian owned fee lands in the "open" area of the Yakima Indian Reservation a threat to the political integrity and economic security of the Yakima Nation sufficient under *Montana v. United States*, 450 U.S. 544 (1981), to require the District Court to balance the interests of the Yakima Indian Nation against those of Yakima County to determine which jurisdictional sovereign should exercise ultimate land use and zoning authority over such lands?

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CONSOLIDATED BRIEF OF RESPONDENT IN OPPOSITION

The respondent, Confederated Tribes and Bands of the Yakima Indian Nation, respectfully prays that the petitions for writ of certiorari to the United States Court of Appeals for the Ninth Circuit be denied.

STATUTES, TREATIES AND CONSTITUTIONAL PROVISIONS INVOLVED

In addition to those set forth in the Petitions for Writ of Certiorari, respondent would add:

A. Constitutional Provision:

1. Article I, Section 8, Clause 3:

"To regulate commerce with foreign nations and among the several states, and with the Indian tribes."

———o———

STATEMENT OF THE CASE

The Confederated Tribes and Bands of the Yakima Indian Nation (Yakima Nation) are a composite of fourteen (14) tribes who came together and negotiated a treaty with the United States which was signed by the parties in 1855. The *Treaty with the Yakimas,* was ratified by Congress in 1869, 12 Stat. 951. (25-A) In this Treaty, the Yakima Nation ceded vast areas of land to the United States reserving, however, an area of land for their use and occupation to themselves which is now known as the Yakima Indian Reservation. (63-A) The *Treaty with the Yakimas,* provided these reserved lands would be for the "exclusive use and benefit" of the Yakima Nation, and that no white man, except those in the employ of the Indian Department, shall be permitted to reside upon said Reservation without permission of the tribe. (64-A)

The Yakima Indian Reservation is located in Southeast Washington. The Reservation's boundaries encom-

pass approximately 1.3 million acres of land, most of which is located in Yakima County. Of the 1.3 million acres, approximately eighty (80%) percent or 1.04 million acres is held in trust by the United States for the benefit of the Yakima Nation or its individual members. Of the remaining land, approximately 260,000 acres are held in fee by both individual members and by non-Indians. (25-A)

The Yakima Indian Reservation was divided by the Yakima Nation into two (2) areas for purposes of non-members. The Yakima Nation created a "closed" area of the Reservation, access to which is limited to Yakima Nation members and to non-members who receive permits. The remainder of the Reservation is open to non-members without restriction. (26-A)

The closed area of the Reservation consists of 807,000 acres, 740,000 of which are located in Yakima County. There are approximately 715,000 acres of trust land and 25,000 acres of fee land in the closed area within Yakima County. Most of the fee land in the "closed" area in Yakima County is owned by a timber company. (49-A) The "open" area of the Reservation consists of approximately 500,000 acres, 350,000 of which are located in Yakima County. Of this, approximately fifty (50%) percent, or 175,000 acres, is trust land and the other fifty (50%) percent, or 175,000 acres, is fee land. (8-A) The record establishes that the majority of the fee land in the "open" area is located in the incorporated cities of Toppenish, Wapato, and Harrah. (25-A) Neither Yakima County nor the Yakima Nation is claiming authority to provide for land use and zoning regulation in the incorporated cities. (8-A) The remainder of the fee land in the "open" area is scattered in checkerboard fashion throughout the "open" area

of the Reservation. The "open" area of the Reservation has a population of approximately 25,000, of whom 5,000 are Indians. In excess of 10,000 of these residents are located in the limits of the three (3) incorporated cities. (50-A)

The land to which this dispute relates is the fee land owned by non-members in the "open" area of the Reservation which is outside the three (3) incorporated cities. Yakima County claims authority to regulate the land use and zoning of the scattered parcels of non-incorporated fee land owned by non-members in the "open" area of the Reservation. The Yakima Nation also claims the authority to regulate the land use and zoning of the scattered parcels of non-incorporated fee land owned by non-members under its zoning code which regulates the land use of all the "open" area of the Reservation outside the limits of the three (3) incorporated cities.

Yakima County adopted its first land use planning ordinance in 1946, and its first formal zoning code in 1965. Yakima County adopted its first comprehensive plan in 1972. (28-A) The Yakima Nation adopted its first zoning code in 1970, which encompassed both trust and fee lands of the Reservation outside the three (3) incorporated cities. The Yakima Nation Zoning Ordinance was amended, becoming more detailed and comprehensive in 1972. (27-A)

Stanley Wilkinson is a non-Indian owning non-incorporated fee land within the "open" area of the Reservation. Mr. Wilkinson owns a 40-acre tract in the northeast corner of the Reservation, three-quarters (¾) of a mile south of the northern boundary. The parcel is approximately three miles south of the city of Yakima.

In September, 1983, Mr. Wilkinson applied to and obtained from Yakima County preliminary approval to subdivide thirty-two (32) acres of unimproved land into twenty (20) lots. Under the Yakima County Zoning Code, Mr. Wilkinson's property was zoned general rural which permitted lot sizes of down to one (1) acre. This action was not allowed or permitted under the zoning code of the Yakima Nation. Under the zoning code of the Yakima Nation, Mr. Wilkinson's property was zoned agricultural which permitted lot sizes down to a minimum of five (5) acres. Buildings were restricted to single family dwellings and to those related to agricultural activities. A conflict developed between the Yakima Nation and Yakima County, and the Yakima Nation brought suit in the United States District Court seeking injunctive relief and a declaratory judgment against Yakima County, Mr. Wilkinson and others.

The District Court dismissed all of the Yakima Nation's claims with prejudice ruling that the County presence (zoning of lands in question) does not burden the tribe or its members per se (52-A) and that "the Yakima Nation is without the authority to exercise regulation jurisdiction over Wilkinson's open area fee land." In this case, *Whiteside II*, the District Court relied on Yakima County's presence in the "open" area to preclude the claims of the Yakima Nation. The District Court found that the County had built 487 miles of road; had adopted shoreline management and flood hazard programs; and had applied its zoning code to the non-Indian owned fee land in the "open" area of the Reservation outside the incorporated cities. The District Court also noted that the population of the "open" area was roughly eighty (80%)

percent non-Indian. The District Court did not "balance" these interests of the County against those of the Yakima Nation. Instead, it concluded the Yakima Nation had no inherent authority to regulate non-members on fee land. (41-A)

The Ninth Circuit Court of Appeals reversed the District Court. In an opinion which consolidated this case, *Whiteside II,* with its companion case, *Whiteside I,* the Court of Appeals held that the District Court was in error in determining that the Yakima Nation had lost its inherent authority to regulate non-member owned fee land of the "open" area of the Reservation outside the incorporated cities. The Court of Appeals directed the District Court to balance the interests of the Yakima Nation, as shaped by federal policy, against those of Yakima County. (18-A)

REASONS FOR DENYING THE WRIT

A.) Petitioners Distort the Effect and Significance of the Decision of the Ninth Circuit.

This case does not merit certiorari. The issue of tribal regulation of non-members has been resolved by this Court in *Montana v. United States,* 450 U.S. 544 (1981). The decision of the Ninth Circuit is not an expansion or distortion of *Montana v. United States, supra.* Nor is the Ninth Circuit decision likely to cause great uncertainty in the Western States. In *Montana v. United States, supra,* this court set forth certain "tests" under which issues of tribal regulation of non-members would be examined. The stated tests are as follows:

> "A tribe may regulate, through taxation, licensing, or other means, the activities of non-members who enter into consensual relationships with the tribe or its members through commercial dealings, contracts, leases, or other arrangements."

Montana v. United States, supra, at 565.

> "A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe."

Montana v. United States, supra, at 566.

The Ninth Circuit determined that the District Court failed to properly consider this second *Montana* test. The Ninth Circuit determined that the Yakima Nation had clearly retained inherent sovereign power to exercise land use and zoning regulation over the lands of the Yakima Indian Reservation. This determination was consistent with *Segundo v. City of Rancho Mirage,* 813 F.2d 1387, 1393 (9th Cir. 1987), in which the Ninth Circuit had determined that "it is beyond question that land use regulation is within the tribe's legitimate sovereign authority over its lands." Because the District Court had erroneously determined that the Yakima Nation no longer retained such inherent sovereign power[1] as to fee land in the "open" area of the Reservation, the Ninth Circuit remanded the matter back to the District Court to weigh and balance the competing interests of the Yakima Nation and

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[1] In fairness to the District Court, the decision of the Ninth Circuit in *Segundo v. City of Rancho Mirage,* supra, was made after the District Court entered its ruling in the proceedings below.

of Yakima County and determine which sovereign should provide ultimate land use and zoning authority.

The concept of balancing the interests of a tribe against those of a state to determine which sovereign has ultimate authority to exercise civil jurisdiction over non-Indians on fee lands is not an expansion or distortion of *Montana*. Such balancing is required by *Montana* and has occurred in several decisions of the Ninth and Tenth Circuits. In *Confederated Salish and Kootenai Tribes v. Namen*, 665 F.2d 951 (9th Cir. 1982) cert. denied 459 U.S. 977 (1982), the Ninth Circuit examined the issue of whether the tribes had regulatory authority over non-members. In *Namen*, the tribes sought to regulate the riparian rights of non-members on fee land adjacent to Flathead Lake which was determined to be property of the tribes. The Ninth Circuit, applying the *Montana* balancing test, held that the conduct of the non-Indians was ultimately subject to tribal regulation as it threatened the political integrity and economic security of the tribes. *Colville Confederated Tribes v. Walton*, 647 F.2d 42 (9th Cir. 1981) cert. denied 454 U.S. 1092 (1981) is another case in which the Ninth Circuit sustained tribal regulation of non-members using a *Montana* analysis as support. Other such cases include *United States v. Anderson*, 736 F.2d 1358 (9th Cir. 1984), *Babbitt Ford, Inc. v. Navajo Indian Tribe*, 710 F.2d 587 (9th Cir. 1983) cert. denied 466 U.S. 926 (1984) and *Cardin v. De La Cruz*, 671 F.2d 363 (9th Cir. 1982) cert. denied 459 U.S. 967 (1982).

The Tenth Circuit in *Knight v. Shoshone and Arapahoe Indian Tribes, Etc.*, 670 F.2d 900 (10th Cir. 1982) sustained the tribal regulation of land use and zoning of fee lands owned by non-members on the Reservation in part

under a *Montana* analysis. The court found the test of *Montana* was met in favor of the tribes, because the political integrity and economic security of the tribes would be threatened in the absence of the tribes' authority to regulate the land use and zoning of the non-member owned fee land.

The decision of the Ninth Circuit in the present case is squarely in line with *Montana* and the Circuit Court decisions subsequent to *Montana*. The petitioners' contention that the Ninth Circuit decision distorts existing authority or appears to be an "overtly political determination" is an erroneous observation, and designed to create a perception that certiorari is necessary when, in fact, it is not.

B.) The Decision of the Ninth Circuit Court of Appeals was Supported by an Overwhelming Factual Record.

Petitioners argue that certiorari should be granted because the Ninth Circuit ignored the finding of the District Court in arriving at its decision. This argument is also not well founded. The record before the Ninth Circuit established that the Yakima Nation derives its authority not only implicitly from congressional policy, but explicitly from a Treaty with the United States, *Treaty With the Yakimas,* 12 Stat. 951. Article II and Article V of this Treaty clearly contemplate that the Yakima Nation will maintain its own laws and govern its membership and lands. The Treaty minutes also establish unequivocally that the Yakima Nation was to remain a sovereign Indian tribe with governmental authority over its land and people. The record before the Ninth Circuit established that

this inherent authority has been maintained and exercised by the Yakima Nation since the time of the Treaty.

The record before the Ninth Circuit also demonstrated that contrary to some Indian tribes,[2] the Yakima Nation and its members have maintained ownership of the vast majority of the Yakima Indian Reservation. This Reservation consists of 1.3 million acres of land. Approximately eighty (80%) percent or 1.04 million acres of this land remains held in trust for the benefit of the Yakima Nation and its individual members. Approximately two-thirds (2/3) of the Reservation is closed to non-members. The remaining one-third (⅓) is not closed to non-members and is known as the "open" area. Two-thirds (2/3) of the fee land of the Reservation (175,000 acres), is located in Yakima County and the vast majority of such fee land is in the "open" area of the Reservation. The majority of this fee land is in the incorporated cities of Toppenish, Wapato, and Harrah, in which neither the Yakima Nation nor Yakima County seek land use or zoning authority. The remaining fee land is owned by both members and non-members of the Yakima Nation.[3] The comprehensive zoning code of the Yakima Nation regulates both trust and fee lands outside the incorporated cities and has a primary

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[2] For example, on the Puyallup Indian Reservation, the Puyallup tribe had alienated in fee all but 22 acres of the 18,000 acre reservation. *Puyallup Tribe v Washington Game Dept.*, 433 U.S. 165, 174 (1977) and on the Port Madison Reservation, the Suquamish Indian tribe had alienated in fee sixty-three (63%) percent of the 7,276 acre reservation. *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 193 (1978).

[3] The District Court made no findings as to the breakdown of fee land owned by non-members and fee land owned by members This brief assumes that some fee land is owned by tribal members, a position known by all parties to be true.

goal of protecting agricultural lands and cultural concerns of the Yakima Nation. Yakima County agreed that the Yakima Nation had the ultimate authority to regulate the land use and zoning for the trust lands in the open area. Yakima County sought only to regulate the fee land of non-members outside the incorporated cities within the Reservation.[4] If the County's position had been sustained, it would provide conflicting[5] land use and zoning regulations to less than five (5%) percent of the total non-incorporated Reservation lands and less than twenty-five (25%) percent of the non-incorporated "open" area lands. The record before the Ninth Circuit also sets forth the economic, environmental, and cultural concerns of the Yakima Nation regarding the subdivision and development of the Wilkinson fee property in question, which concerns were not addressed by the Yakima County in administering its zoning code.[6]

With these facts and others before it, the Ninth Circuit was compelled to conclude that the efforts by Yakima County to impose land use and zoning jurisdiction upon the checkered parcels of non-incorporated fee land owned

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[4] The position of Yakima County in the District Court was that it had ultimate regulatory power for land use and zoning of fee land owned by tribal members, but it appears to no longer advocate this position

[5] The Zoning Code of the Yakima Nation and that of Yakima County are somewhat similar. The Yakima Nation presented evidence to the District Court that it had not found most previous zoning decisions of Yakima County particularly objectionable. The Yakima Nation also presented evidence that it had processed over 300 land use applications by non-members for fee lands, and has claimed regulatory authority for non-incorporated fee lands since 1972.

[6] See footnote 5 of the Ninth Circuit decision, page 18-A of Appendix.

by non-members constituted a threat to and disruption of the comprehensive land use and zoning regulations of the Yakima Nation, and, accordingly, a threat to its political integrity and economic security. The Ninth Circuit correctly concluded that because there was a threat to the political integrity and economic security of the Yakima Nation, a remand of the case to the District Court for a *Montana* balancing analysis was necessary. This decision was made by the Ninth Circuit from the facts in the record before it. The decision is in accord with the case-by-case approach of the Circuit Courts and does not constitute a departure from other decisions containing a *Montana* analysis.

C.) A Writ of Certiorari is Not Justified by Other Arguments of Petitioners.

Petitioner Wilkinson argues that the Ninth Circuit opinion results in the potential for a "case-by-case" resolution of jurisdiction disputes to support his request for certiorari. Such a position demonstrates that petitioner Wilkinson fails to understand that *Montana* requires a "case-by-case" analysis. Petitioner Yakima County argues that the Ninth Circuit opinion results in a departure of the "case-by-case" analysis, citing previous disputes involving the civil jurisdiction of tribes over non-members to support its request for certiorari. Both petitioner Wilkinson and petitioner Yakima County improperly construe the Ninth Circuit opinion in light of the record and a proper understanding of the *Montana* decision.

Petitioners raise other arguments to support the petitions for writs of certiorari. All of these arguments have had previous attention from this Court. Petitioner Wilkinson raises the argument that the inherent power of the

Yakima Nation to regulate land use and zoning of the non-incorporated fee lands of non-members is a Fifth Amendment violation because of the inability of the non-Indians to participate in tribal government. This argument was rejected in *United States v. Mazurie,* 419 U.S. 544 (1975).

Petitioner Yakima County argues that the checkerboard zoning of the non-incorporated "open" area of Reservation approved by the District Court, but of which the Ninth Circuit was critical, was approved by this Court in *Washington v. Confederated Tribes and Bands of the Yakima Indian Nation,* 439 U.S. 463 (1979). This position is a misapplication of that decision. In *Washington v. Confederated Tribes and Bands of the Yakima Indian Nation, supra,* the issue was the application of the partial assumption of civil jurisdiction by the state over fee lands on the Reservation pursuant to Public Law 280. Public Law 280 had authorized the states to provide state court jurisdiction as to disputes and occurrences on fee lands. This Court found this assumption of partial jurisdiction to be lawful despite the checkerboard effect. Checkerboard civil jurisdiction to state courts has no relationship to the issue of the effectiveness of checkerboard zoning jurisdiction. This Court has subsequently ruled that Public Law 280 does not intrude upon inherent tribal regulatory authority. *California v. Cabazon Band of Mission Indians,* 480 U.S. —, 107 S.Ct. 1083 (1987). This case does not present a circumstance which would cause this Court to re-examine the reach of Public Law 280.

Both petitioner Yakima County and petitioner Wilkinson emphasize that it is pertinent that Yakima County has claimed land use and zoning authority as to non-incorporated fee land owned by non-members for 35 years. This

circumstance was not significant to the Ninth Circuit and should have no bearing on the issue of certiorari. *Montana* provides that such a circumstance is only a factor or an indication of whether certain conduct of non-Indians threatens the political integrity or economic security of the tribe. In *Montana* at 566, this court concluded that state regulation of hunting and fishing by non-members on the fee land of the Crow Reservation posed no threat to the political or economic security of the tribe. This was "evidenced" by the unaltered finding that the tribe had accommodated itself to the state's "near exclusive" regulation of hunting and fishing on fee lands of the reservation. In the present case, the Yakima Nation has been providing land use and zoning regulation to non-member owned fee land since 1972. A serious conflict finally developed and this litigation has resulted. The record before the Ninth Circuit did not establish that the Yakima Nation had accommodated itself to Yakima County's regulation of the non-member owned fee lands.

All of petitioners' arguments in support of certiorari can be reduced to simply another effort to dilute the sovereignty of the Yakima Nation and other Indian tribes. In case after case, this Court has protected the sovereign status of Indian tribes, including the recent case of *Iowa Mut. Ins. Co. v. LaPlante,* 480 U.S. —, 107 S. Ct. 971 (1987). Other representative cases in which this Court has recognized and guarded this concept include *Williams v. Lee,* 358 U.S. 217 (1958); *United States v. Wheeler,* 435 U.S. 313 (1978); *Merrion v. Jicarilla Apache Tribe,* 455 U.S. 130 (1982); and *New Mexico v. Mescalero Apache Tribe,* 462 U.S. 324 (1983). The decision of the Ninth Circuit does not require certiorari and review by this Court.

The decision of the Ninth Circuit was correct and was based upon the application of the *Montana* analysis to the factual record before it. There is no question certiorari should be denied.

CONCLUSION

For the foregoing reasons and authorities, certiorari should be denied.

Respectfully submitted,

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APPENDIX A

CONFEDERATED TRIBES and BANDS
of the YAKIMA INDIAN NATION,

Plaintiffs-Appellees

v.

JIM WHITESIDE, et al., Defendants,

and

PHILIP BRENDALE, Defendant-Appellant.
CONFEDERATED TRIBES and BANDS
of the YAKIMA INDIAN NATION,

Plaintiffs-Appellants,

v.

COUNTY of YAKIMA, et al.,

Defendants-Appellees.

Nos. 85-4316, 85-4433 and 85-4383.

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted Nov. 6, 1986.

Decided Sept. 21, 1987.

Yakima Indian Nation brought two actions seeking declaratory judgments and injunctions upholding its right to impose its zoning and land use laws on fee land owned by non-Indians within reservation. The United States District Court for the Eastern District of Washington, JUSTIN L. QUACKENBUSH, J., 617 F.Supp. 735, 617 F. Supp. 750, held in part for Indian Tribe, and in part for county, and appeals were taken. The Court of Appeals,

Fletcher, J., held that: (1) county was precluded from zoning fee land within closed area of Indian reservation, and (2) remand was required to balance federal, tribal and county's interests in imposing zoning ordinances on fee land owned by non-Indians in open area of reservation. First case affirmed; second case reversed and remanded.

1. Indians 32(10)

Statute granting state courts jurisdiction over civil litigation involving reservation Indians did not intrude upon tribal regulatory authority, and thus did not affect Indian tribe's authority to zone. West's RCWA 37.12.010; 18 U.S.C.A. § 1162; 28 U.S.C.A. § 1360.

2. Indians 32(8)

States may impose laws on non-Indians engaged in activities upon Indian reservations unless given law is preempted by federal law or unless it unlawfully infringes on right of reservation Indians to self-government; court must balance interests of federal, tribal and state authorities to determine whether state is precluded from regulating particular conduct of non-Indians on Indian reservations

3. Indians 32(10)

Indian tribe had authority to zone non-Indian fee land within reservation boundaries.

4. Indians 32(10)

County was precluded from zoning land owned in fee by non-Indian within closed area of reservation given significant interests of Indian tribe, as shaped by federal policy of recognizing Indian sovereignty and encouraging

tribal self-government, and absence of any interest of county beyond general interest in providing regulatory functions to its taxpaying citizens.

5. Indians 32(10)

Remand was required, in zoning dispute between county and Indian tribe, for factual determination of whether interest of tribe, as shaped by federal policy of recognizing Indian sovereignty and encouraging tribal selfgovernment, outweighed interest of county in imposing zoning ordinances on fee land owned by non-Indians in open area of reservation.

James B. Hovis, Yakima, Washington, for plaintiffs-appellants.

Charles C. Flower, Jeffrey C. Sullivan, David A. Thompson, and Patrick Andreotti, Yakima, Washington, for defendants-appellees.

Appeal from the United States District Court for the Eastern District of Washington.

Before SKOPIL, FLETCHER and POOLE, Circuit Judges.

FLETCHER, Circuit Judge:

The Confederated Tribes and Bands of the Yakima Indian Nation (Yakima Nation) brought these two cases in federal court seeking a declaratory judgment and an injunction barring the defendants from making or permitting any land use within the Yakima Indian Reserva-

tion that is contrary to the Amended Zoning Regulations of the Yakima Nation. In *Whiteside I*, 617 F.Supp. 735, the district court found that Yakima Nation's interests in zoning fee land owned by non-members within the closed area of the reservation were infringed by the application of Yakima County's (the County) zoning ordinances and therefore precluded county zoning. By contrast, in *Whiteside II*, 617 F.Supp. 750, the district court found that Yakima Nation did not have the authority to zone non-Indian fee land in the "open" area, and permitted application of the County's ordinances.

Defendant Philip Brendale, record owner of fee land in the closed area at issue in *Whiteside I*, appeals on the ground that Yakima Nation has no interest in regulating fee land owned by non-members. We affirm the judgment in *Whiteside I*. Yakima Nation appeals the judgment in *Whiteside II* and argues that the tribe has the authority to zone non-Indian fee land in the open area, and further that the federal and tribal interests outweigh the County's interest in regulating the land. We agree that Yakima Nation possesses the requisite authority to zone, and remand to the district court to balance the federal, tribal and County's interests.

FACTS

I. Whiteside I

The Yakima Indian Reservation is composed of 1.3 million acres of land. Of this amount, about 807,000 acres, including 740,000 acres in Yakima County, fall within the reservation's closed area. Only 25,000 acres of the closed area within Yakima County are held in fee. The closed area is restricted to members of Yakima Nation

and permittees in order to protect and enhance its natural resources, natural foods, medicines, game wildlife, and environment. Much of the closed area is forested with timber, a mainstay of Yakima Nation's economic operations. The closed area is relatively undeveloped. There are no permanent residents in the part of the closed area located in Yakima County.

In 1970, Yakima Nation adopted its first zoning ordinance. The ordinance was made more comprehensive in 1972. The tribal code provides for five categories of districts: agricultural, residential, commercial, industrial and restricted. It also establishes requirements for building permits, authorizes the creation of Planned Development Districts, and provides for special use permits. Under the tribal code, only the following uses are permitted in the closed area:

1. Harvesting wild crops;

2. Grazing, timber production or open field crops;

3. Hunting or fishing by Tribal members;

4. Camping in temporary structures;

5. Tribal camps for the education and recreation of tribal members.

6. Construction and occupancy of buildings and structures constructed by the Yakima Nation or the Bureau of Indian Affairs to be used in the furtherance of tribal resources;

7. No building or other permanent structure or any appurtenances thereto other than those allowed in Sections 1-6 above shall be allowed in this district;

8. Any structure which is authorized in Sections 1-6 above shall be set back 200 feet from any waterway.

Yakima County has regulated land use since 1946, but passed its first comprehensive zoning ordinance in 1965. Within the reservation, the County regulates fee land but not trust land. The County zoned the closed area as "forest watershed," which permits such structures as single family dwellings, commercial campgrounds, overnight lodging facilities with less than sixteen units, restaurants, bars, and general stores. The forest-watershed district is designed to conserve land and water while accommodating pressures for residential, recreational and commercial uses. The County has other land-use regulations applicable to fee land. These include the 1974 subdivision ordinance, which impose standards for streets, water, sewage, drainage, parks and recreation areas, and school sites the Yakima County Shoreline Master Program and a federal flood insurance program.

The Brendale property consists of 160 acres of fee land within the forested portion of the closed area. The nearest county road is over twenty miles away. In January, 1982, Brendale filed four contiguous short plat applications with the Yakima County Planning Department, which issued a Declaration of Non-Significance and later approved the applications. In April, 1983, he submitted a long plat application to divide one of his new twenty-acre parcels into ten two-acre lots. He intended the lots to be sold as summer cabin or trailer sites. The County Planning Department issued a Declaration of Non-Significance, which Yakima Nation appealed on the grounds that the County did not have authority to regulate the Brendale land and that the development would significantly affect

the environment. The Commissioners found that the County had jurisdiction, but that an Environmental Impact Statement (EIS) should be prepared. Yakima Nation brought this suit as the County began work on EIS.

II. Whiteside II

Approximately half of the land in the open area is held in fee. Most of the open area is rangeland, and land used for agriculture, and residential and commercial developments. Agriculture and related activities are the primary source of income. Non-members are permitted to move freely in this area. The County maintains an extensive road system of nearly five hundred miles throughout the open area. Most of the fee land lies within the three incorporated towns of Toppenish, Wapato and Harrah. The rest is scattered throughout the reservation in a checkerboard pattern, some clustered in particular areas. Roughly eighty percent of the population of the open area, including that of the incorporated towns, are non-members of Yakima Nation. It appears that neither Yakima Nation nor the County regulates land use within the incorporated towns.

Under Yakima Nation's Amended Zoning Ordinance, the Wilkinson property is zoned "agricultural." This designation indicates that the "principal use of the land is for agricultural purposes." All buildings are prohibited except agriculture related buildings, agriculture product processing plants, buildings on public parks and playgrounds and single family dwellings. The minimum lot size is five acres. This is the only type of agricultural district under the Yakima Nation's Code.

The County's agricultural zones include three types: "exclusive agricultural," "general agricultural," and "general rural." Under "exclusive agricultural" lot size minimums are forty acres, under 'general agricultural," twenty acres, and under "general rural," one acre. The County has designated the Wilkinson property as "general rural." This zoning is intended to "'provide protection for the county's unique resources and land base;' 'minimize scattered rural developments . . . by encouraging clustered development;' and 'permit only those uses which are compatible with [the] rural character.'" District court opinion in *Whiteside II,* at 753. The number and variety of uses possible under special use permits is considerably greater than those allowed within exclusive and general agricultural districts. As noted above, the County has other extensive land-use regulations.

The Wilkinson property is a forty-acre tract of fee land about three-quarters of a mile south of the reservation's northern boundary. The City of Yakima is three miles to the north of the tract. The property is vacant sagebrush land.

In September, 1983, Wilkinson applied to the Yakima County Planning Department to subdivide thirty-two acres into twenty lots ranging in size from 1.1 to 4.5 acres, each lot to be used for a single family residence. Wilkinson submitted an environmental checklist from which the Planning Department initially determined that an EIS was required. However, the Planning Department issued a Declaration of Non-Significance after Wilkinson agreed to modify his proposal. Yakima Nation appealed, arguing that the County was without authority to regulate and that the proposal would significantly affect the environ-

ment. The Commissioners affirmed and Yakima Nation filed suit in federal court.

DISCUSSION

I. *Public Law 280*

[1] Brendale and the County maintain that Washington's enactment of Wash.Rev.Code § 37.12.010, adopted pursuant to Pub.L. No. 280, 67 Stat. 588 (1953) *as amended,* 18 U.S.C. § 1162, 28 U.S.C. § 1360 (1982 and Supp. III 1985) (Public Law 280), divested Yakima Nation of authority to regulate the activities of non-Indians on fee-owned land within reservation boundaries. This argument lacks merit. Public Law 280 grants state courts jurisdiction over civil litigation involving reservation Indians, but does not intrude upon tribal regulatory authority. *California v. Cabazon Band of Mission Indians,* — U.S. —, 107 S.Ct. 1083, 1087-88, 94 L.Ed.2d 244 (1987). Because zoning is clearly regulatory, Public Law 280 does not affect Yakima Nation's authority to zone.

II. *Preemption and Infringement*

[2] Yakima Nation's claim, in essence, is that the state, acting through the County, is barred from imposing its zoning ordinances to control non-member fee land on the reservation. States may impose laws on non-members engaged in activities on Indian reservations unless a given law is preempted by federal law or unless it " 'unlawfully infringes on the right of reservation Indians to self-government" ' *United States v. Anderson,* 736 F.2d 1358, 1363 (9th Cir. 1984) (quoting *Colville Confederated Tribes v. Walton,* 647 F.2d 42, 51 (9th Cir.), *cert. denied,* 454 U.S. 1092, 102 S.Ct. 657, 70 L.Ed.2d 630 (1981). We must balance

the interests of federal, tribal and state authorities to determine whether a state is precluded from regulating particular conduct of non-members on Indian reservations. *White Mountain Apache Tribe v. Bracker,* 448 U.S. 136, 145, 100 S.Ct. 2578, 2584, 65 L.Ed.2d 665 (1980); *see also Segundo v. City of Rancho Mirage,* 813 F.2d 1387, 1391 (9th Cir. 1987).

1. *Federal Preemption*

Yakima Nation asserts that federal law preempts the application of state law. It lists a number of federal statutes that Yakima Nation maintains embody federal policy to provide for tribal self-government and protection of reservation resources. Broad preemptive effect is accorded not only specific federal statutes, but the policies animating them. *Ramah Navajo School Bd. v. Bureau of Revenue,* 458 U.S. 832, 838, 102 S.Ct. 3394, 3398, 73 L.Ed. 2d 1174 (1982). We therefore construe preemption generously, and may find preemption even if Congress has not expressly stated an intention to preempt state law. *Id.*

Yakima Nation is correct that many of these statutes, *see, e.g.,* Indian Financing Act of 1974, 25 U.S.C. § 1451 *et seq.* (1982); *Indian Child Welfare Act of 1978,* 25 U.S.C. § 1901 *et seq.* (1982); Indian Civil Rights Act of 1968, 25 U.S.C. § 1301 *et seq.* (1982), embody and advance a broad federal policy of recognizing Indian sovereignty and encouraging tribal self-government. *See New Mexico v. Mescalero Apache Tribe,* 462 U.S. 324, 334-35 & n. 17, 103 S.Ct. 2378, 2386-87 & n. 17, 76 L.Ed.2d 611 (1983). Others facilitate and encourage tribal management of Indian resources. Of particular note, the Indian Self-Determination and Education Assistance Act, 25 U.S.C.

§ 450 *et seq.* (1982 and Supp. III 1985), authorizes the Secretary of the Interior, upon a tribe's request, to enter into a contract with the tribe, to reallocate management of land use programs involving trust land, including zoning, from the federal government to the tribe. 25 C.F.R. § 271.32 (1986). These statutes may not establish the "comprehensive and detailed federal involvement in or regulation of the particular tribal activity," *Chemehuevi Indian Tribe v. California State Bd. of Equalization,* 800 F.2d 1446, 1448 (9th Cir. 1986), *cert. denied,* — U.S. —, 107 S.Ct. 2184, 95 L.Ed.2d 840 (1987), necessary to find federal preemption, that existed in *Bracker,* 448 U.S. at 145-48, 100 S.Ct. at 2584-86, or in *Segundo,* 813 F.2d at 1392-94. At a minimum, however, they embody a federal policy that informs our inquiry concerning the reach of Indian sovereignty.

2. *Tribal Authority*

Before we may consider Yakima nation's interest in regulating non-member fee land, we must determine whether it possesses the requisite regulatory authority. The Supreme Court has long recognized the inherent "attributes of sovereignty [in Indian tribes] over both their members and their territory." *Iowa Mut. Ins. Co. v. LaPlante,* — U.S. —, 107 S.Ct. 971, 975, 94 L.Ed.2d 10 (1987) (quoting *United States v. Mazurie,* 419 U.S. 544, 557, 95 S.Ct. 710, 717, 42 L.Ed.2d 706 (1975)). Yakima Nation derives authority not only implicitly from its status as a dependent sovereign, but explicitly from the Treaty with the Yakimas, 12 Stat. 951, 2 Kapplers 524 (1855), in which Yakima Nation and the United States agreed that Yakima

Nation reserved to itself and was guaranteed a right to its "own government" and its "own laws."

Tribal authority extends to regulation over the activities of non-Indians on reservation lands. *Iowa Mutual* 107 S.Ct. at 978. Such authority, however, is more limited than that over Indians. The Supreme Court has, without apparent consistency, applied two tests to determine the limit on tribal authority over the conduct of non-Indians. In *Washington v. Confederated Tribes of the Colville Indian Reservation,* 447 U.S. 134, 100 S.Ct. 2069, 65 L.Ed.2d 10 (1980), the Court held that tribal sovereignty is divested only when its exercise is inconsistent with overriding federal interests. "[I]t must be remembered that tribal sovereignty is dependent on, and subordinate to, only the Federal Government, not the States." *Id.* at 154, 100 S.Ct. at 2081. Nine months later, the Supreme Court in *Montana v. United States,* 450 U.S. 544, 101 S.Ct. 1245, 67 L.Ed.2d 493 (1981), reiterated language disregarded by *Colville,* that Indian tribes have been implicitly divested of their sovereignty to regulate relations between the tribe and nonmembers by virtue of their dependent status. *Id.* at 563-64, 101 S.Ct. at 1257-58 (citing *United States v. Wheeler,* 435 U.S. 313, 98 S.Ct. 1079, 55 L.Ed.2d 303 (1978)). The Court held that the "exercise of tribal power beyond what is necessary to protect tribal selfgovernment or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation." *Id.* 450 U.S. at 564, 101 S.Ct. at 1258.

The *Montana* Court identified two exceptions to the limitation on tribal regulatory authority over non-members. The exceptions stem from inherent tribal authority

over the tribe's members and to manage its territory as well as the power to exclude non-members from its reservation. *Anderson*, 736 F.2d at 1364; *Babbitt Ford, Inc. v. Navajo Indian Tribe*, 710 F.2d 587, 592 (9th Cir. 1983), *cert. denied*, 466 U.S. 926, 104 S.Ct. 1707, 80 L.Ed.2d 180 (1984). A tribe retains authority to regulate "the activities of nonmembers who enter consensual relationships with the tribe or its members through commercial dealing, contracts, leases, or other arrangements." *Montana*, 450 U.S. at 565, 100 S.Ct. at 1258. A tribe also retains inherent regulatory authority over the conduct of non-Indians on fee land when the conduct "threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." *Id.* at 566, 100 S.Ct. at 1258 (the "tribal interest" test).

[3] Yakima Nation asserts that we should apply the *Colville* test and hold that it has authority to zone non-Indian fee land under that test. Because we conclude that Yakima Nation has authority under the more stringent tribal-interest test employed in *Montana*, we need not determine whether the *Colville* analysis is appropriate to determine tribal authority over non-Indians.[1]

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[1]Most of our cases have applied the *Montana* test, without referring to the conflicting language in *Colville*, to determine whether a tribe has the power to regulate non-Indians within reservation boundaries. *See, e.g., United States v. Anderson*, 736 F.2d 1358 (9th Cir. 1984); *Babitt Ford, Inc. v. Navajo Indian Tribe*, 710 F.2d 587 (9th Cir. 1983), *cert denied*, 466 U.S. 926, 10 S.Ct.1707, 80 L.Ed.2d 587 *cert. denied*, 466 U.S. 926, 104 S.C. 1707, 80 L.Ed.2d 180 (1984); *Cardin v. De La Cruz*, 671 F.2d 363 (9th Cir.), *cert. denied*, 459 U.S. 967, 103 S.Ct. 293, 74 L.Ed.2d 2277 (1982) We did, however, apply both tests in *Confederated Salish and Kooteenai Tribes v. Namen*, 665 F.2d 951 (9th Cir), *cert. denied*, 459 U.S. 977, 103 S.Ct. 314, 74 L.Ed. 2d 291 (1982)

We recently held that "[i]t is beyond question that land use regulation is within the Tribe's legitimate sovereign authority over its lands." *Segundo*, 813 F.2d at 1393 (holding that a city could not apply its rent control ordinance in conflict with tribal ordinance to non-Indians on reservation trust land)). Zoning, in particular, traditionally has been considered an appropriate exercise of the police power of a local government, precisely because it is designed to promote the health and welfare of its citizens. *See Knight v. Shoshone and Arapahoe Indian Tribes of the Wind River Reservation*, 670 F.2d 900, 903 (10th Cir. 1982); *see generally Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 47 S.Ct. 114, 71 L.Ed. 303 (1926). By enacting zoning ordinances, a tribe attempts to protect against the damage caused by uncontrolled development, which can affect all of the residents and land of the reservation.[2] Tribal zoning is particularly important because of the unique relationship of Indians to their lands. Comment, *Jurisdiction to Zone Indian Reservations*, 53 Wash.L.Rev. 677, 680 (1978). Further, a major goal of zoning is the "systematic and coordinated utiliza-

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[2]The Yakima Nation's Code sets out its purpose:

The controls as set forth in this ordinance are deemed necessary in order to encourage the most appropriate use of the land; to protect the social and economical stability of residential, agricultural, commercial, industrial, forest, reserved and other areas within the reservation, and to assure the orderly development of such large areas; and to obviate the menace to the public safety resulting from the improper location of buildings and the uses thereof, and the establishment of land uses along primary highways in such a manner as to cause interference with existing and proposed traffic movement on said highways; and to otherwise promote the public health, safety, morale and general welfare in accordance with the rights reserved by the Yakima Indian Nation.

tion of land" in a particular area. N. Williams, *American Land Planning Law*, § 1.06 (1974), *cited in* Comment, 53 Wash.L.Rev. at 679. Comprehensive planning enables a centralized regulatory authority to balance the competing needs of landowners and to distribute land uses in a desirable pattern. *Id.* at § 1.08, *cited in* Comment, 53 Wash. L.Rev. at 685. Yakima Nation has exclusive authority to zone tribal trust land, which constitutes nearly all of the closed area and over half of the open area. Although the fee land owned by non-Indians is clustered primarily in one part of the reservation, the reservation still exhibits essentially a checkerboard pattern. If we were to deny Yakima Nation the right to regulate fee land owned by non-Indians, we would destroy their capacity to engage in comprehensive planning, so fundamental to a zoning scheme. This we are unwilling to do.

3. *Balance of Interests*

Having concluded that Yakima Nation has the authority to zone non-Indian fee land within the reservation boundaries, we must consider whether the interests of Yakima Nation, as shaped by federal policy, outweigh those of the County. We review the district court's findings of fact, including its balancing of the interests, under a clearly erroneous standard.

A. *Whiteside I*

[4] In addition to its general interest in asserting political authority—an interest that, as noted above, federal policy seeks to advance—Yakima Nation has a significant interest in zoning the closed area of the reservation. To protect grazing, forest and wildlife resources, Yakima

Nation restricted the closed area to its members and permittees in 1954 and the Bureau of Indian Affairs restricted use of federally maintained roads in the closed area in 1972. The closed area is relatively undeveloped, with no permanent residences in the Yakima County portion of the area, and residences in other portions predate the zoning ordinance. The closed area, which is about two-thirds forested, provides substantial economic support to the tribe through timber operations, and supplies many Yakima Nation members with a food supply. Its religious and spiritual value also motivates the Yakima Nation's protection of the closed area from development.

The district court found that the Brendale development would cause disruption of Yakima Nation's interests. Construction and use of roads and cabins would cause soil disturbance and erosion, deterioration of ambient air quality, change of water absorption rates and draiange patterns, destruction of some trees and natural vegetation, likely alteration of migration patterns of deer and elk, increased noise levels and thicker population density. Development would necessitate new police and fire services.

The County's zoning classification, if applied, would permit the construction of such structures as single family dwellings, commercial campgrounds, overnight lodging facilities with less than six units, restaurants, and bars in the restricted area. The imminence of such construction is suggested by the fact that Brendale, himself, has stated he intends to build other developments on land adjacent to the property which is the subject of this suit. The district court's recognition of Yakima Nation's concern with maintaining the character of the closed area indicates that

the court properly focused on Yakima Nation's interest in regulating the entire closed area, including the Brendale property.[3]

By contrast, Brendale has not identified any interest the County has in regulating the closed area. The district court noted that the only interest asserted by the County was a general interest in providing regulatory functions to its taxpaying citizens. Further, Brendale has not argued that the Yakima Nation's regulation of the closed area has an effect outside the boundaries of the reservation.[4]

We conclude that the district court properly found that the County is precluded from zoning fee land within the closed area because the County's interest in imposing its regulation is outweighed by the significant interests of Yakima Nation.

B. *Whiteside II*

Yakima Nation has alleged a number of justifications for regulating the open area and in particular the Wilkin-

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[3]Brendale points out that Yakima Nation constructed a permanent structure of twelve dormitory cabins and two larger buildings in the closed area. Even if Brendale's development would have no greater impact on the closed area than the Yakima Nation's structure, a question the district court never considered, we believe the proper analysis addresses the multiplied burden of potential additional development that could occur if the Yakima Nation zoning ordinance were revoked.

[4]Perhaps noteworthy, the County, itself, did not join Brendale in appealing the district court's decision.

son property.[5] The County, by contrast, has not suggested any off-reservation interest in imposing its zoning code on fee land within the reservation. *See Mescalero Apache*, 462 U.S. at 336, 103 S.Ct. at 2387 ("The exercise of state authority which imposes additional burdens on a tribal enterprise must ordinarily be justified by functions or services performed by the State in connection with the on-reservation activity. Thus a State seeking to impose a tax on a transaction between a tribe and nonmembers must point to more than its general interest in raising revenues. A State's regulatory interest will be particularly substantial if the State can point to off-reservation effects that necessitate state intervention.") (citations omitted).

[5] We conclude, however, that for this court to weigh the varying interests at this time would be premature. Because the district court found that Yakima Nation lacked the authority to zone fee land owned by non-Indians within the open area, it did not make findings of fact concerning the interests asserted, nor did it bal-

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[5]As alleged, Yakima Nation's interest in controlling land use in the open area, although obviously less compelling than that in the closed area, appears also to be strong. The open area is largely used for agriculture, upon which many tribal members depend for their livelihood. Specifically with regard to the Wilkinson property, Yakima Nation has asserted that the proposal would require the construction of new roads and could alter the flow and quantity of ground water. Yakima Nation alleges that there is a substantial danger of severe erosion and runoff from the subdivision and that the comtemplated change in the land use of the Wilkinson parcel and development of the surrounding area, would interfere with Yakima Nation's interest in the integrity of its culture and way of life. Sacred burial grounds are located in the area. Finally, Yakima Nation alleges that increased development would require additional police services.

ance the federal, tribal, and state interests. We therefore remand to the district court the issue of whether the interests of Yakima Nation, as shaped by federal policy, outweigh the interests of the County in imposing zoning ordinances on fee land owned by non-Indians in the open area.

CONCLUSION

The district court's judgment in *Whiteside I* is affirmed. Its judgment in *Whiteside II* is reversed and remanded.

APPENDIX B

YAKIMA INDIAN NATION, Plaintiff,

v.

WHITESIDE, et al., Defendants.

No. C-83-724-JLQ.

United States District Court,
E.D. Washington

September 11, 1985.

Yakima Indian Nation brought suit seeking declaratory judgment and injunction upholding its right to impose its zoning and land use law on fee land owned by non-Indian within reservation, and asserting claims under civil rights statute and state environmental law. The District Court, Quackenbush, J., held that: (1) the Yakima Nation was without authority to exercise regulatory jurisdiction over non-Indian's fee land within "Open Area" of reservation; (2) the Nation had no civil rights claim; and (3) determination that proposed subdivision would not have significant adverse impact on the environment was not clearly erroneous.

Judgement for defendants.

1. Indians 32(8)

Assumption by the state of Washington of jurisdiction over the Yakima reservation pursuant to Act Aug. 15, 1953 § 6, 67 Stat. 588 did not grant state authority over non-Indians nor divest tribe of whatever inherent

power it had over reservation activities of non-Indians. West's RCWA 37.12.010.

2. Indians 32(8)

The only limitations on the power of state and political subdivisions to assert sovereign powers over reservation activities of non-Indians are the independent but related barriers of "infringement on the inherent tribal sovereignty" and federal preemption.

3. Indians 32(10)

Absent a "consensual relationship" between non-Indian and tribe or its members, critical factual determination in deciding whether tribe may regulate the land use of a non-Indian on fee land is whether the non-Indian's activities pose a threat to the tribe's political integrity, economic security, or health and welfare.

4. Indians 32(8)

Yakima Nation was without authority to exercise regulatory jurisdiction over fee land of non-Indian within "Open Area" of reservation where that part of the reservation, having many non-Indian residents was not of unique religious or spiritual significance to members of the Yakima Nation, county's zoning ordinance would adequately regulate the land use and not pose threat to trust lands, and proposed development did not threaten the political integrity, economic security, or health and welfare of the Yakima Nation, though its zoning ordinance differed in some respects from that of the county. Treaty With the Yakimas, Art. 1 et seq., 12 Stat. 951.

5. Constitutional Law 278.2(2)

Indian nation was not denied due process by county commissioners' failing to provide nation a meaningful opportunity to be heard on issue of whether the nation was entitled to exercise exclusive jurisdiction over land use within certain portion of reservation, where purpose of hearings at which nation sought to assert such issue was appeal of planning department's declaration that proposed development did not warrant preparation of environmental impact statement and hearing was not an appropriate forum to contest jurisdiction. U.S.C.A. Const. Amend. 14.

6. Civil Rights 13.3(1)

County had not infringed on any "right" of Indian tribe so as to give rise to claim under civil rights statute, section 1983, by regulating land use activities on fee land of non-Indian within reservation, where Indian tribe had no right to regulate such activities. 42 U.S.C.A. § 1983.

7. Health and Environment 25.15(10)

Review of county's declaration of nonsignificance, such that environmental impact statement is not required with respect to proposed development, is limited to question of whether declaration was clearly erroneous, and declaration is "clearly erroneous" when, though there is evidence to support it, reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed, being mindful that decision of governmental agency shall be accorded substantial weight. West's RCWA 43.21C.030(c); 42 U.S.C.A. §§ 1983, 1988.

8. Health and Environment 25.10(2)

County's declaration of nonsignificance, so that environmental impact statement was not required with respect to proposed housing development on fee land within Indian reservation, was not clearly erroneous in light of agreement eliminating adverse impact of private roads and mitigating septic system problem, as indicated by testimony that each of the lots had a site suitable for an individual septic system. West's RCWA 43.21C.030(c); 42 U.S.C.A. §§ 1983, 1988.

Jeffrey C. Sullivan, Pros. Atty., Yakima County, Yakima, Wash., for defendants Whiteside, Tollefson, Klarich, Anderwald and Yakima County.

Patrick Andreotti, Flower & Andreotti, Yakima, Wash., for defendant Brendale.

John K. Johnson, Brooks & Larson, Yakima Wash., for defendant Stanley L. Wilkinson.

Walter G. Meyer, Helverson & Applegate, Yakima, Wash., for defendants Gatliff and Keller.

James B. Hovis, Hovis, Cockrill, Weaver & Bjur, Yakima, Wash., for plaintiff.

MEMORANDUM OPINION

QUACKENBUSH, District Judge.

The Yakima Indian Nation (Yakima Nation) brought this suit seeking a declaratory judgment and injunction barring the defendants from taking or permitting any

land use within the so-called "Open Area" of the Yakima Indian Reservation (Reservation) which is contrary to the Amended Zoning Regulations of the Yakima Nation (Yakima Nation Code). The named defendants are the Yakima County Commissioners; the Director of Yakima County Planning Department; and Stanley Wilkinson, record owner of fee land within the "Open Area."[1] Specifically, the plaintiff seeks to impose its zoning and land use law on a 32 acre parcel of land owned by defendant Wilkinson. Additionally, the Yakima Nation asks the court to limit Yakima County's regulatory authority over this property to the extent that the County's laws would allow land uses inconsistent with those permitted by the plaintiff. In other words, the plaintiff seeks a judicial declaration that its regulatory jurisdiction over Wilkinson's property is paramount and exclusive.

The plaintiff's complaint also contains allegations of civil rights deprivations. More particularly, the Yakima Nation contends that the County's assertion of its zoning jurisdiction over the Wilkinson property violated Section 1 of the Civil Rights Act of 1971. (Codified at 42 U.S.C. § 1983).

Following a four day bench trial the court entered an oral decision favorable to the defendants. (Ct. Rec. 81).[2]

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[1]In addition to those defendants, the complaint also named Jim Gatliff and Dick Keller, prospective purchasers of some of the at-issue property. By oral ruling on May 23, 1984 the court, pursuant to Fed.R.Civ.P, 41(b), rendered judgment in favor of defendants Gatliff and Keller.

[2]The court's oral decision encompassed only the plaintiff's request for a declaratory judgment on the regulatory jurisdiction

(Continued on following page)

What follows is the court's written opinion including its Findings of Fact and Conclusions of Law. This written opinion shall supplement the court's oral opinion.

FACTUAL BACKGROUND

The Yakima Indian Nation is a composite of fourteen (14) originally distinct Indian tribes who banded together in the mid-1900's for the purpose of negotiating with the United States. Pursuant to a treaty signed in 1855 and ratified in 1869, 12 Stat. 951, these various tribes ceded vast areas of land but also reserved an area for their "exclusive use and benefit." This reserved area is the Yakima Nation Indian Reservation (Reservation).

The Reservation is locaed in southeastern Washington. Its exterior boundary encompasses approximately 1.3 million acres of land. Of this amount, about eighty percent of the land is held in trust by the United States for the benefit of the Tribe or its individual members (trust lands). The remaining land is held in fee by Indians or non-Indian owners (fee land). The majority of the fee land lies within the three incorporated towns in the northeastern part of the reservation—Toppenish, Wapato and Harrah. The remainder is scattered throughout the reservation creating the now familiar "checkerboard" effect. The fee lands fall within the boundaries of Klickitat, Lewis and Yakima Counties.

(Continued from previous page)

issue. The Yakima Nation's Section 1983 claim and pendent state claim were expressly excluded from the oral decision but are addressed in this written opinion.

Most of the trust land lies within the Reservation's "Closed Area," an area accessible only by members of the Yakima Nation and its permittees. This area occupies essentially the western two-thirds of the Reservation. It covers approximately 807,000 acres, 740,000 of which fall within Yakima County. Of this latter figure, 25,000 acres are fee land. The Closed Area is predominantly forested (about two-thirds), the balance being classified as range land. The topography of this area varies from the gently sloping range land along its eastern edge, to deep river valleys in the central part and finally to the mountain peaks of the Cascade Range along its western boundary.

The "Closed Area" is relatively undeveloped. There are no permanent residences in the Yakima County portion of the area. Its abundant flora and fauna serve as a source of food for many members of the Yakima Nation; its forest provide substantial economic support; and its intangible and spiritual values play a significant role in the tribal culture. In sum, as this court found in *Yakima Indian Nation v. Whiteside, et al.*, 617 F.Supp. 735 (1985) (*Whiteside I*), "the Closed Area is an integral part of the Yakima Indian Nation."

The "Open Area", on the other hand, is strikingly dissimilar to the "Closed Area." As its name suggests, access to the area is not limited by the Yakima Nation and non-tribal members move freely throughout the area. Compared to the prediminantly forested "Closed Area", the "Open Area" is primarily composed of rangeland, agricultural land and land being used for residential and commercial purposes. Another distinguishing characteristic is that almost half of the total "Open Area" acreage

is fee land. That factor, coupled with the extensive county-maintained road system and residential and commercial developments render the "Open Area" a sharp contrast to the pristine, wilderness-like character of the "Closed Area."

Tribal Land Use Regulations:

In October 1970, the Yakima Nation instituted its first Zoning Ordinance. That ordinance was a six-page Tribal Resolution modeled after a similar Yakima County ordinance. The Zoning Ordinance designated all areas within the exterior boundaries of the reservation, both trust and fee lands (except the incorporated cities and towns) as being within the General Use District. All otherwise lawful uses were generally permitted except certain activities requiring a conditional use permit. *E.g.*, asphalt mixing plants, junk yards, certain feedlots, above ground storage tanks, etc. The Board of Adjustment, composed of all the members of the Tribal Council, sat as the Board of Appeals from administrative decisions and the Hearing Board for conditional use applications. Its decisions were the final tribal action.

In May 1972, the Yakima Nation adopted a new zoning law, the Amended Zoning Ordinance, which remains in effect today. Like its predecessor, the Amended Zoning Ordinance expressly is made applicable to fee land. Besides that similarity, this twenty-seven page document resembles the original ordinance only in the composition of the Board of Adjustments and its function. Otherwise, it is much more detailed and comprehensive. Among other things, it establishes a requirement for building permits, minimum lot sizes, authorizes the establishment of Planned

Development Districts, provides for Special Use Permits and creates five categories of Use Districts. These Use Districts are: Agricultural, Residential, Commercial, Industrial, and Reservation Restricted Area.

The at-issue Wilkinson property is zoned "agricultural" by the Yakima Nation. According to the Amended Zoning Ordinance, that designation denotes that the "principal use of the land is for agricultural purposes." Buildings are prohibited on land zoned "agricultural", except as follows: agriculture-related buildings, agriculture products processing plants, buildings on public parks and playgrounds and single-family dwellings. The minimum lot size in an agriculture use district is five acres. The Yakima Nation's designation of the at-issue property as "agriculture" and the resultant limited uses is the primary source of the present litigation.

Yakima County Land Use Regulations:

As early as 1946 the County of Yakima regulated land use within its boundaries. This regulation was, however, not extensive until 1965 when the county adopted its first zoning ordinance which, as stated previously, was the model for the Yakima Nation's initial zoning ordinance.

The present comprehensive zoning regulations, The Yakima County Code, was first enacted in 1972. It was struck down for a procedural defect, but readopted in its same form in October, 1974. Within its seventy-two pages, the Yakima County Code identifies numerous specified use districts which generally regulate agricultural, residential, commercial, industrial, and forest-watershed uses. In the reservation area, the official county zoning map segregates

the fee lands from the trust lands. The county does not apply its zoning law to trust lands.

Yakima County has designated the subject Wilkinson property as "general rural." "General rural" is a use district established in a 1982 amendment to the Yakima County Code which eliminated a single "agricultural" designation and replaced it with three separate use districts: "exclusive agricultural;" "general agricultural;" and "general rural." Both the "exclusive" and "general" agricultural districts permit varied agriculture-related uses. The main difference between these two agricultural districts is that the former has a minimum lot size of 40 acres while the minimum lot size for the latter is 20 acres. Both agricultural districts, however, allow the parcel to be subdivided once every five years to create a lot no more than two acres but no less than one-half acre in size. The two agricultural districts are expressly designated to protect the County's agricultural land and prohibit or minimize the impact of uses which are inconsistent with agricultural uses.

The "general rural" designation of the Wilkinson property, on the other hand, is designated to accommodate a broader range of uses. This district is intended to "provide protection for the county's unique resources and land bases," "minimize scattered rural developments . . . by encouraging clustered development," and "permit only those uses which are compatible with [the] rural character." Although the "permitted uses" for this district are identical to those of the "exclusive" and "general" agricultural districts, the potential number and variety of uses possible via special use permits are considerably

greater. The minimum lot size in the "general rural" district is one-half acre but the average size of lots created by a subdivision must be at least one acre.

In addition to its comprehensive zoning regulation, Yakim County has other land use regulations applicable to fee land within the county. Its 1974 Subdivision Ordinance imposes standards for streets, water, sewage, drainage, parks and recreation areas, and school sites. The Yakima County Shoreline Master Program, adopted in 1974 as mandated by state law, regulates certain activities adacent to shorelines. Also, as a participant in the federal flood insurance program the county attempts to control flood plain development. Another of Yakima County's state-mandated land use regulations is its Environmental Ordinance which requires a review of the potential environmental impact of all non-exempt land use actions. None of the above-described regulations have been applied to trust lands on the Yakima Nation Reservation.

Defendant Wilkinson owns a 40 acre tract of fee land in the extreme northeast corner of the Reservation.[3] The land is approximately three-quarters of a mile south of the Reservation's northern boundary. The parcel is situated on the northern slope of Ahtanum Ridge, overlooking the Yakima Municipal Airport (1½ miles to the north) and the City of Yakima (3 Miles to the north). Wilkinson's property is bordered to the north by trust land and to the east, south and west by fee land. Currently, the property is vacant safebrush land.

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[3]Wilkinson is a non-Indian and is not a member of the Yakima Nation.

In September 1983 defendant Wilkinson applied to the Yakima County Planning Department to subdivide a portion of his 40 acre parcel. Specifically, by filling five contiguous short plat applications, Wilkinson proposed to subdivide 32 acres into twenty lots. The lot sizes range from 1.1 acres to 4.5 acres. The proposal contemplates that each lot will be used for a single family residence to be served by individual well and on-site septic systems.

In compliance with the county's Environmental Ordinance, Mr. Wilkinson submitted an Environmental checklist from which the county Planning Department could assess the potential impact of his proposed development and decide whether an Environmental Impact Statement (EIS) was warranted. As discussed *infra,* the Planning Department initially issued a Declaration of Significance, necessitating the preparation of an EIS. That declaration was, however, withdrawn and replaced by a Declaration of Non-Significance after Wilkinson agreed to modify his proposal as suggested by the county.

Thereafter, the Yakima Nation timely appealed that Declaration of Non-Significance to the Yakima County Board of Commissioners. The grounds for the appeal were two-fold: (1) that Yakima County was without authority to regulate the land use of the Wilkinson property and (2) that the proposed Wilkinson development would significantly affect the environment and therefore and EIS was required. A hearing on the Tribe's appeal was conducted by the County Commissioners on October 25, 1983. During the early stages of the hearing, the Yakima Nation strenuously argued the regulatory jurisdictional issue but, based advice from the county legal department,

the Commissioners concluded that the appeal was properly before the Board and limited the appellants to presenting evidence as to the EIS issue only. Following hearing testimony and cross-examination of witnesses, the Commissioners found that the Wilkinson proposal would not have a significant impact on the environment and affirmed the County Planning Department's Declaration of Non-Significance.

Yakima County has withheld final disposition of Wilkinson's subdivision proposal pending the outcome of this litigation.

In addition to the factual background as set forth above, the court makes the following specific factual findings:

1. The proposed Wilkinson subdivision described real property situated in Yakima County Washington:

The Northeast Quarter of the Southwest Quarter of Section 10, Township 12 North, Range 18 East, W.M. The property is approximately three miles south of the City of Yakima, one-quarter mile south of McCullough Road and approximately one-half mile east of 42nd Avenue.

2. The subject parcel lies within the exterior boundaries of the Yakima Nation Reservation in the so-called "Open Area."

3. Three incorporated municipalities-Harrah, Toppenish and Wapato—with a total population of approximately 10,000 people lie within the "Open Area."

4. Roughly eighty percent of the "Open Area"s' residents are non-Indians. Those individuals represent

approximately fourteen percent of the total population of Yakima County.

5. The "Open Area" is serviced primarily by close to five hundred miles of Yakima County-maintained roads.

6. Agriculture and related activities are the leading source of income in the "Open Area."

7. Yakima County has a Comprehensive Plan and a Rural Land Use Plan expressly designed to protect the county's valuable agricultural land and other resources.

8. To effectuate the goals of those plans, the county has adopted a comprehensive zoning ordinance. The "Open Area" is primarily zoned "exclusive agriculture", "general agriculture" and "general rural." "Exclusive" and "general" agriculture zones predominate. Within the "Open Area" that zoning scheme achieves a delicate balance of protecting agricultural land and other resources while allowing for some development.

9. In part due to the parcel size requirements of the county's "exclusive" and "general" agriculture zones, *i.e.*, 40 and 20 acres respectively, the Yakima County zoning scheme is more protective of the Open Area's agricultural lands than the Yakima Nation's "agricultural" use district which allows agricultural land to be divided into 5-acre lots.

10. The trust land in the vicinity of the Wilkinson property is not a significant source of food for members of the Yakima Nation. The proposed Wilkinson development does not threaten a food source of members of the Yakima Nation.

11. Similarly, the Wilkinson project does not threaten the economic security of the Yakima Nation. The plaintiff has not demonstrated how Yakima County's regulation of the land use of Wilkinson's "Open Area" property in any way places its economic security in jeopardy.

12. In contrast to the "Closed Area", the "Open Area" is not of a unique religious or spiritual significance to the members of the Yakima Nation. The county's regulation of the Wilkinson property will not significantly infringe on those cultural values.

13. While the court is aware of the special role which land and other natural resources play in the culture of the Yakima Indian Nation, the court finds that the county's exercise of its land use regulatory jurisdiction over the subject property does not threaten those aspects of the tribal culture.

14. The Yakima Nation's political integrity will not be diminished. The County's regulation of Wilkinson's fee land will not hinder the Yakima Nation from exercising its regulatory jurisdiction over the trust land.

15. In sum, the court finds that Yakima County's exercise of its regulatory jurisdiction over the at-issue Wilkinson property does not threaten and will not have a direct effect on the Yakima Nation's political integrity, its economic security or its health or welfare.

LEGAL ANALYSIS

The court's legal analysis must focus on three issues: the regulatory jurisdiction question; the Yakima Nation's Section 1983 claim; and, the pendent state claim. Each of these issues will be addressed separately.

A. JURISDICTION TO REGULATE LAND USE:

The resolution of the jurisdictional dispute requires a two-step analysis. The court must first decide whether the Yakima Nation has any authority to regulate the activities of defendant Wilkinson on his Open Area fee land. If the tribe does indeed have that power, then the next inquiry is whether Yakima County may exercise its concurrent jurisdiction over the same property. If, on the other hand, the Yakima Nation lacks the power to assert regulatory jurisdiction over Wilkinson's property, then the second step in the analysis is not necessary—Yakima County will have exclusive authority over Wilkinson's fee land.

1. *Tribal Authority: Public Law 280:*

The defendants argue that Congress has stripped the Yakima Nation of any power it may have had to exercise civil regulatory authority over Wilkinson's property. Specifically, the defendants contend that when the State of Washington assumed jurisdiction over the Yakima Reservation pursuant to § 6 of the Act of August 15, 1953, 67 Stat. 588, 590 (Public Law 280) (hereinafter P.L. 280) the Yakima Nation was divested of its inherent tribal authority to regulate the activities of non-Indians on deeded land.[4] The gist of their argument is that P.L. 280

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[4]WASH.REV.CODE § 37.12.010 provides:

Assumption of criminal and civil jurisdiction by state. The State of Washington hereby obligates and binds itself to assume criminal and civil juridiction over Indians and Indian territory, reservations, country, and lands within this state in accordance with the consent of the United States given by the act of August 15,

(Continued on following page)

was a *grant* of jurisdiction to the state (and therefore the county) which necessarily must have *withdrawn* jurisdiction from the Tribe. This argument is without merit for several reasons.

[2] To begin with, P.L. 280 neither increased nor diminished a state's authority over the reservation activities of non-Indians. In no way can it be construed as a grant of such authority—no such grant was necessary. Under P.L. 280, states retain the same regulatory juris-

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1953 (Public Law 280, 83rd Congress, 1st Session), but such assumption of jurisdiction shall not apply to Indiana when on their tribal lands or allotted lands within an established Indian reservation and held in trust by the United States or subject to restriction against alienation imposed by the United States, unless the provisions of R.C.W. 37.12.021 [tribal consent] have been invoked, except for the following:

(1.) Compulsory school attendance;

(2.) Public assistance;

(3.) Domestic relations;

(4.) Mental illness;

(5.) Juvenile delinquency;

(6.) Adoption proceedings;

(7.) Dependant children; and

(8.) Operation of motor vehicles upon the public streets, alleys, roads and highways. *Provided further,* that Indian tribes that petitioned for, were granted and became subject to state jurisdiction pursuant to this chapter on or before March 13, 1963 shall remain subject to state civil and criminal jurisdiction as if chapter 36, Laws of 1963 had not been enacted.

This partial assumption of jurisdiction over Indians (based on the status of the land on which the questioned activity occurred) has been sanctioned by the Supreme Court, *Washington v. Confederated Bands and Tribes of the Yakima Indian Nation,* 439 U.S 463, 99 S.Ct. 740, 58 L.Ed.2d 740 (1979).

diction over the on-reservation activities on non-Indians "that they enjoyed prior to that Law." *White Mountain Apache Tribe v. State of Arizona,* 649 F.2d 1274, 1279 (9th Cir. 1981). And it is settled law that long before the enactment of P.L. 280, states (and presumably a political subdivision like Yakima County) had the power to assert sovereign powers over the reservation activities of non-Indians. *See, e.g., Draper v. United States,* 164 U.S. 240, 17 S.Ct. 107, 41 L.Ed. 419 (1896); *Utah & Northern R.R. v. Fisher,* 116 U.S. 28, 6 S.Ct. 246, 29 L.Ed. 542 (1885). The only limitations on that power are the independent but related barriers of "infringement on the inherent tribal sovereignty", *see e.g., Williams v. Lee,* 358 U.S. 217, 79 S.Ct. 269, 3 L.Ed.2d 251 (1959) and the doctrine of "federal preemption." *See e.g., New Mexico v. Mescalero Apache Tribe,* 462 U.S. 324, 103 S.Ct. 2378, 76 L.Ed. 2d 611 (1983).

Further evidence that P.L. 280 did not in any way affect the powers of a state over non-Indians is the law's purpose. P.L. 280 was designed to remedy the problem of the lack of state jurisdiction over *Indians* in their dealings (criminal or civil) with non-Indians. *See* Goldberg, *Public Law 280: The Limits of State Jurisdiction Over Reservation Indian,* 22 U.C.L.A. Law Rev. 535 (1975). The states needed Congressional authorization to exert power over Indians. No such authorization was needed, however, as to the states' authority over non-Indians. Thus, P.L. 280 was *not* a grant to the states of jurisdictional power over non-Indians. Accordingly, it cannot be construed as supplanting the tribe's authority with state

authority[5] or divesting the tribe of whatever inherent power it has over the reservation activities of non-Indians. *See Cardin v. De La Cruz,* 671 F.2d 363 (9th Cir. 1982), *cert. denied,* 459 U.S. 967, 103 S.Ct. 293, 74 L.Ed.2d 277 (1982); *Sechrist v. Quinault Indian Nation,* I.L.R. 3064 (W.D.Wash. 1982).[6]

2. *Tribal Authority: The Montana Test:*

Having concluded that P.L. 280 did not affect a Tribe's regulatory authority over non-Indian fee land, the court must now determine whether the Yakima Nation has such authority over Wilkinson's fee land. Although Indian Tribes possess "attributes of sovereignty over both their members and their territory," *United States v. Wheeler,* 435 U.S. 313, 323, 98 S.Ct. 1079, 1086, 55 L.Ed. 2d 303 (1978), the dependent status of tribes and their

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[5]Even if P.L. 280 were interpreted as an affirmation or expansion of the state's jurisdiction over non-Indians, it is limited to "civil litigation" and not "general state civil regulatory control" such as zoning. *See Brian v. Itasca County,* 426 U.S. 373, 384-85, 96 S.Ct. 2102, 2108-09, 48 L Ed.2d 710 (1976); *Barona Group of Capitan Grande Band v. Duffy,* 694 F.2d 1185, 1188 (9th Cir. 1982) (P.L. 280, does not enable California to impose its regulatory bingo laws on the reservation); *United States v. County of Humboldt,* 615 F.2d 1260 (9th Cir 1980) (California municipality may not zone restricted lands); *Santa Rosa Band of Indians v. Kings County,* 532 F.2d 655 (9th Cir. 1976) (California county may not zone restricted lands).

[6]Both cited cases upheld the Quinault Indian Nation's application of its zoning laws to non-Indian owned deeded lands. The State of Washington exercises the same degree of P.L. 280 jurisdiction over the Quinault Indian Reservation as it does over the Yakima Reservation. *See Comenout v Burdmann,* 84 Wash. 2d 192, 525 P.2d 217 (1974). Implicitly then, these two cases must be interpreted as rejecting the notion that P.L. 280 stripped tribes of their civil jurisdictional authority.

diminished status as sovereign limits their power in relations between a Tribe and non-members of the Tribe. *Id.* at 326, 98 S.Ct. at 1087. In fact, Indian Tribes have been divested of the power to exercise any criminal jurisdiction over non-Indians. *Oliphant v. Suquamish Indian Tribe,* 435 U.S. 191, 98 S.Ct. 1011, 55 L.Ed.2d 209 (1978). Similarly, a Tribe's inherent power to exert civil jurisdiction over non-Indians has been diminished. While a Tribe does possess the power to "exclude nonmembers entirely or to condition their presence on the reservation." *New Mexico v. Mescalero Apache Tribe,* 462 U.S. 324, 103 S.Ct. 2378, 2385, 76 L.Ed.2d 611 (1983), apparently that power may be exercised over non-Indian fee lands only in limited circumstances, *Montana v. United States,* 450 U.S. 544, 101 S.Ct. 1245, 67 L.Ed.2d 493 (1981). Thus, in certain situations a Tribe may "exercise some forms of civil jurisdiction over non-Indians on their reservation, even on non-Indian fee lands." *Id.* at 565, 101 S.Ct. at 1258. Unfortunately, the parameters of that power are anything but settled; nevertheless, the Court has provided guidance which is pertinent to the case at hand.

[3] The *Montana* Court identified two situations in which the exercise of tribal civil jurisdiction over non-Indian fee land may be appropriate. The first instance is where a non-Indian, through a business relationship or otherwise, has entered into a "consensual relationship" with the tribe or its members. *Id.* at 565, 101 S.Ct. at 1258. Such is not the case here as there is no evidence of any "consensual relationship" between the Yakima Nation and Wilkinson which would place the subject property within the authority of the Tribe.

The second situation described by the *Montana* Court is where the non-Indian's conduct "threatens or has some direct effect on the political integrity, the economic security or the health or welfare of the Tribe." *Id.* at 566, 101 S.Ct. at 1258. Thus, absent a "consensual relationship," the critical factual determination which must be made in deciding whether a Tribe may regulate the land use of a non-Indian on fee land is whether the non-Indian's activities pose a threat to the Tribe's political integrity, its economic security or its health and welfare. *Id.* at 565-66, 101 S.Ct. at 1258-59, *see United States v. Anderson,* 736 F.2d 1358 (9th Cir. 1984) (tribe lacked power to regulate water use of non-Indian fee landowners within the reservation); *Cardin v. De La Cruz,* 671 F.2d 363 (9th Cir. 1982) (building, health and safety regulations applied to nonmember business located on fee lands within the reservation), *cert. denied,* 459 U.S. 967, 103 S.Ct. 293, 74 L.Ed.2d 277 (1982) *Knight v. Shoshone & Arapahoe Indian Tribes,* 670 F.2d 900 (10th Cir. 1982) (tribal zoning ordinance applied to fee land within the reservation); *Colville Confederated Tribes v. Walton,* 647 F.2d 42 (9th Cir. 1981) (tribe allowed to exercise regulatory authority over water use of Non-Indian fee landowners within the reservation), *cert. denied,* 454 U.S. 1092, 102 S.Ct. 657, 70 L.Ed.2d 630 (1981); *Sechrist v. Quinault Indian Nation,* 9 I.L.R. 3064 (W.D.Wash. 1982); *Lummi Indian Tribes v. Hallover,* 9 I.L.R. 3025 (W.D.Wash. 1982).

[4] As stated in the Findings of Fact, this court finds that Wilkinson's proposed development does not pose a threat to the "political integrity," "the economic security" or the "health and welfare" of the Yakima Nation. The mere fact that the Tribe's zoning ordinance

differs in some respects from that of Yakima County does not rise to the level of a "threat" to the Tribe. As applied in the "Open Area," Yakima County's zoning ordinance will adequately regulate the land use of the fee lands and not pose a threat to the trust lands. Consequently, this court must conclude that the Yakima Nation is without authority to exercise regulatory jurisdiction over Wilkinson's "Open Area" fee land.

B. SECTION 1983 CLAIM:[7]

The bases for the Yakima Nation's civil rights claim are twofold. First, the Tribe asserts that the County Commissioners denied it due process of law by not providing the Tribe a meaningful opportunity to be heard on the jurisdictional issue. Second, the Tribe argues that Yakima County's attempts to exercise jurisdiction over the Wilkinson property violated rights enforceable under Section 1983. For the reasons discussed below, the court concludes that neither of these two alleged bases of Section 1983 liability has merit.

[5] Assuming that the Yakima Nation is a proper plaintiff in a Section 1983 action,[8] the court finds that it

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[7]42 U.S.C. § 1983 states:
Every person who, under color of any statute, ordinance, regulation custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other property proceeding for redress.

[8]The parties have expended considerable effort in debating whether an Indian Tribe such as the Yakima Nation may

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was not denied due process of law by the Yakima County Commissioners. The purpose of the hearing conducted on October 25, 1983 was to hear the Tribe's appeal of the Planning Department's Declaration of Non-Significance. The hearing was statutorily mandated to provide the Tribe with the opportunity to convince the Commissioners that the Planning Department had erred and show that Brendale's proposed development warranted the preparation of an Environmental Impact Statement. The hearing was neither designed as a forum to contest jurisdiction nor was it an appropriate forum for such a debate. As demonstrated by the complexity of this lawsuit and the cases cited in this opinion, Indian reservation jurisdictional disputes are not easily resolved. It is unrealistic for the Yakima Nation to expect and even demand that it be given free reign at the administrative podium to argue and present evidence pertaining to the issue of jurisdiction, particularly when the Commissioner's sole function was to determine whether an EIS was warranted. The Commissioner's decision to allow the Yakima Nation to state is objections to the county's jurisdiction over the Wilkinson property and then going forward with the appeal hearing was the proper course of action. The Tribe suffered no infringement on its rights to due process of law. *See generally Mathews*

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bring a Section 1983 action. The resolution of that issue turns on whether the Tribe is "any citizen of the United States or other *person* within the jurisdiction thereof . . ." 42 U.S.C. § 1983 (emphasis added). Neither the court nor the litigants have located any legal precedent which directly addresses that issue. It is not, however, necessary to answer that novel question since the court concludes that the Yakima Nation has not been deprived of "any rights, privileges, or immunities secured by the Constitution and laws. . ." *Id.*

v. Eldridge, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976); *Goss v. Lopez,* 419 U.S. 565, 95 S.Ct. 729, 42 L.Ed. 2d 725 (1975); *Goldberg v. Kelly,* 397 U.S. 254, 90 S.Ct. 1011, 25 L.Ed.2d 287 (1970).

[6] While the Tribe's first basis for its Section 1983 Claim must fail because no due process deprivation occurred, its second basis fails because the county has not infringed on any "right" of the Tribe: The Yakima Nation has no "right" to regulate the land use activities on the Wilkinson property and therefore the county's regulation of the property does not infringe on any "right" of the Tribe.[9] Thus, the court concludes that the plaintiff has not stated a Section 1983 claim and is therefore not entitled to attorney's fees under Section 1983.

PENDENT CLAIM: SEPA VIOLATION

In addition to the regulatory jurisdiction issue which is governed by federal law, the Tribe asserts a pendent claim based upon Washington state law. Specifically, the Tribe alleges that Yakima County erred in its determination that the proposed Wilkinson subdivision would not have a significant adverse impact on the environment. See R.C.W. 43.21C.030(c) for the reasons discussed below, the court concludes that the declaration of nonsignificance was not "clearly erroneous" and, therefore, is affirmed. *See*

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[9]In contrast to this case, in *Whiteside I* the court determined that the Yakima Nation does have the authority to exercise regulatory jurisdiction over fee land within the "Closed Area." Furthermore, the court concluded that the County of Yakima is "preempted" from exercising its concurrent jurisdiction over that same land. Nevertheless, the court held that "preemption" does not give rise to a claim cognizable in a Section 1983 action.

Norway Hill v. King, County Council, 87 Wash.2d 267, 552 P.2d 674 (1976) (standard of review of "negative threshold determinations" governed by "clearly erroneous test").

Initially, Yakima County concluded that the proposed subdivision would have "a significant adverse impact on the environment." (Trial Exhibit 221-15). That Declaration of Significance identified two factors which led to the decision: (1) the potential impact of 1.5 miles of private access roads; and, (2) the potential impact of private septic systems and individuals wells in the "event of future redivision of the 20 lots." *Id.* The Declaration of Significance stated, however, that it could be withdrawn and replaced with a declaration of non-significance if certain conditions were met. *Id.* Those conditions were designed to prevent or mitigate the potential adverse effects of the private access road, and the proliferation of individual septic systems. *Id.*

By written agreement with the County of Yakima, Mr. Wilkinson modified his proposal by agreeing to have the private roads designed and constructed according to proper engineering standards and maintained by private road maintenance association. (Trial Exhibit 221-18). Additionally, Wilkinson agreed that "[a] note shall be placed on the face of each short plat limiting further division of any of the lots described on the said short plats unless and untill an approved public water supply is developed to serve all of the parcels." *Id.* Because of these modifications the County withdrew its Declaration of Significance and issued a final Declaration of Non-Significance (Trial Exhibit 221-19), thereby negating the re-

quirement that an Environmental Impact Statement be prepared.

In the timely manner, this Tribe appealed the Declaration of Non-Significance to the Yakima County Commissioners. Following a hearing, the Commissioners found *inter alia,* that "the potential adverse environmental impacts of the proposal as originally presented will be mitigated or prevented by the measures outlined in the agreement." (Trial Exhibit 222). Based upon their findings, the Commissioners concluded that "the proposed contiguous short plats submitted by Stanley L. Wilkinson will not have a significant adverse environmental impact" and affirmed the Declaration of Non-Significance. *Id.*

[7] This court's review of the County's Declaration of Non-Significance is limited; the only question is whether it was "clearly erroneous." *Norway Hill v. King County Council,* 87 Wash.2d 267, 552 P.2d 674 (1976). A determination is " 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *Hayden v. Port Townsend,* 93 Wash.2d 870, 880, 613 P.2d 1164 (1980) (*quoting Norway Hill,* 87 Wash.2d at 274, 552 P.2d 674). In applying that standard, this court is mindful that the "decision of the governmental agency shall be accorded substantial weight." *Id.* at 880, 613 P.2d 1164 (quoting, Wash.Rev. Code 43.21C.090).

[8] The Tribe, while conceding that the written agreement (Trial Exhibit 221-18) eliminated the pretrial adverse impact of the private roads, argues that the septic system problem has not been eliminated or sufficiently

mitigated. That argument, however, was rejected by the County Commissioners who found that the septic system problem "will be mitigated or prevented by the measures outlined in the agreement . . ." (Trial Exhibit 222). This court must also reject the Tribe's argument as the County's decision is not "clearly erroneous." It is supported by the recommendation of the Yakima Health District which had performed on-site inspections of soil profile holes (Trial Exhibit 221-12); the soil and slope classification of the United States Soil Conversation Service which indicates that portions of the subject property are suitable for "septic tank absorption fields." (Trial Exhibit 221-8); and, the testimony of Mr. Anderwald who stated that each of the newly created lots had a site suitable for an individual septic system. (Trial Exhibit 219 at p. 19). That evidence, combined with the fact that no further subdivision is to occur absent the installation of a community water system leads this court to conclude that no "mistake has been committed," *Norway Hill*, 87 Wash.2d at 274, 552 P.2d 674, and the Declaration of Non-Significance was not "clearly erroneous."

Wash.2d at 274, 552 P.2d 674, and the Declaration of Non-Significance was not "clearly erroneous."

CONCLUSION

Based upon the above Findings of Fact and legal conclusions, judgment shall be entered against the plaintiff and in favor of defendants to the following extent:

1. The court declares that the Yakima Nation has no authority to exercise regulatory jurisdiction over the land use of the Wilkinson property decsribed in this memo-

randum opinion. Plaintiff's request for declaratory and injunctive relief is DENIED and its regulatory jurisdiction claim is DISMISSED WITH PREJUDICE.

2. Plaintiff's Section 1983 claims are DISMISSED WITH PREJUDICE.

3. Yakima County's Declaration of Non-Significance is AFFIRMED and plaintiff's pendent state SEPA claim IS DISMISSED WITH PREJUDICE.

IT IS ORDERED. The clerk is directed to enter this Order and forward copies to counsel.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WASHINGTON

FILED IN THE
U.S. DISTRICT COURT
Eastern District of Washington
JUNE 8, 1984
J.R. FALLQUIST, Clerk
———— Deputy

CONFEDERATED TRIBES and BANDS of the YAKIMA INDIAN NATION,

Plaintiff,

vs.

COUNTY of YAKIMA, JIM WHITESIDE GRAHAM TOLLEFSON, CHARLES KLARICH, RICHARD F. ANDERWALD, STANLEY WILKERSON, JIM GATLIFF and DICK KELLER,

Defendants.

NO. C-83-724-JLQ

May 24, 1984
Yakima, Washington
2:45 P.M.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

BEFORE THE HONORABLE JUSTIN L. QUACKENBUSH, Judge.

Filed and entered on June 08, 1984.

THE COURT: This case, of course, is a companion case to the so-called Whiteside I case, which is Cause No. *C-83-604-JLQ, Whiteside I being a case recently decided*

by this Court, by this Judge, involving the Closed Area of the Yakima Indian Reservation. For reasons which I stated in my Oral Opinion in Whiteside I, and for other reasons stated in my soon-to-be-filed written Opinion in Whiteside I, I determined that Yakima County was without jurisdiction to impose its zoning code on deeded land within the Closed Area portion of the Yakima Indian Reservation.

While this case also involves land with the exterior boundaries of the Yakima Indian Reservation, the factual circumstances in the two cases are strikingly distinct. They are as different in my opinion, as night and day. I will explain those distinctions somewhat in this Opinion.

In the Closed Area, as referred to in Whiteside I, the Closed Area encompasses some 870,000 acres of land. Approximately 740,000 acres of land in the Closed Area was within Yakima County. Only some 25,000 acres, or approximately three percent of that total land, was deeded land which was held in trust. Most of that three percent, or that relatively miniscule 25,000 acres, was owned and is owned by a timber company. Very few, if any, permanent residents reside in the Closed Area, and it is my recollection from the testimony that no non-Indians were permanent residents of the Closed Area.

Contrasting those circumstances, in the Closed Area is the completely different geographic and demographic facts that apply and exist in the so-called Open Area, and I am, once again, referring to the Open Area as being that portion of the Yakima Indian Reservation not included in the Closed Area as it was defined for me and to me during the trial of Whiteside I.

While the total acreage in the Closed Area really isn't clear, and very frankly, Mr. Hovis, I want to say that the acreage total that Mrs. Hill had from the computer, and I'm not saying Mrs. Hill made an error, I'm very frankly troubled by computer statistics, it would appear to me from the statistics furnished me in Whiteside I that the total acreage in the Open Area is some 350,000. Whatever the acreage is, a substantial portion of the land within the Open Area is deeded non-trust land.

I surmise that if one were to utilize the yellow area suggested by Mr. Sullivan in his argument from Exhibit No. 250, one could well find that the non-trust ownership within that yellow area would approach some fifty percent, or some figure close thereto.

The population statistics are completely different between the Closed Area and the Open Area. I don't recall that there were population statistics furnished in Whiteside I. It may well be there weren't any furnished because there weren't any permanent residents. As I have indicated earlier, it is my recollection from Whiteside I that there were very few, if any, permanent residents in the Closed Area or portion of the reservation.

In contrast to those figures, in the Open Area, an area that would appear to be about half the size of the Closed Area, I find that there were some 25,000 residents of whom approximately 5,000 or one-fifth are Indians, or some twenty percent, the other eighty percent being non-Indians.

Within the Open Area of the reservation are three incorporated cities: Toppenish, Washington, with a population of 6,575; Wapato, Washington, with a population of

3,310, and Harrah, Washington, with a population of 345. So, as I have indicated, the demography of the area is different, the population is different, and the size of the area is different.

The Closed Area is primarily forest land, which forest land is responsible for producing, as I recall, approximately ninety percent of the Yakima Indian Nation's annual income. Contrasted with that is the use made of the Open Area, which is primarily and predominantly agricultural.

I find that the county has exercised zoning jurisdiction on deeded land in the Open Area for the past thirty-five years. Other than the issues raised in this case, the Wilkinson Plat, and with one other possible exception which I believe was the blood plant down around Toppenish, it appears that the Yakima Indian Nation has not legally contested the county's jurisdiction to zone non-trust, deeded lands within the Open Area of the Yakima Indian Reservation.

There, likewise, are substantial differences, in my opinion and I so find, between the county's interest in the Closed Area and the county's interest in the Open Area, I found in Whiteside I, the closed Area case, that there really were no interests that the county had in attempting to authorize Mr. Brendale to build a residential development in the middle of the Closed Area. For that reason, I further found that the county was preempted from attempting to impose its zoning code even over deeded land owned by non-Indians in the Closed Area.

Contrasting those circumstances or lack thereof as to the Closed Area, in the Open Area the county's presence

and interest are obvious. The county has built and maintained 487 miles of road, some 240 miles of which are hard-surfaced. The great majority, approximately eighty percent, of the residents in the Open Area are non-Indians. The county has continuously applied its comprehensive zoning plans, zoning code, and sub-area plans on the deed land in the Open Area.

I further find that the county's interest is evidenced by the county's Shoreline Management Program, which is required by state law, and which is applied by the county on Ahtanum Creek and on the Yakima River. The county's presence is further evidenced as is the county's interest by its participation in the Flood Hazard Program, which enables a resident in the Closed Area to participate in the Federal Flood Insurance Program.

The evidence further indicates that all but some one hundred children, the one hundred being Indian children who attend an Indian school, but the evidence indicates that the remainder of the children, both Indian and non-Indian, attend schools that are public schools rather than being operated by the Yakima Indian Nation.

Those are examples of the interest of the county in maintaining its presence in the Open Area of the Yakima Indian Reservation. I find that this county presence does not burden the Tribe or the Tribal Members per se.

During Mr. Hovis' argument on the Rule 41(b) Motion yesterday, I discussed with Mr. Hovis the history of the dealings by the United States' Government with the Indian Tribe. Setting aside the question of whether or not the treaties were fair and whether they were executed

under duress, the conduct of the United States Government in honoring treaties is not one that would make any person proud thereof. We citizens of this country, and those of us particularly who are involved in its legal system take great pride in the sanctity of contract. That sanctity of contract apparently was subjugated by the feeling of the United States Government and its leaders, at least in the 1880's, that the United States Government was in the role of a conquerer who, at its will, could modify the terms of an agreement reached by alleged good faith negotiations between sovereign nations and its people. That, however, is not a matter that I have the power to rectify that is a matter for congressional enactment, for the Legislative Branch to rectify if they determine that appropriate action should be taken.

The relationship between the United States Government and the Tribes has come full circle. From the time of the Treaty, a philosophy of assimilation was adopted as was evidenced by the Dawes Act and the General Allotment Acts in the 1880's where despite the treaties, the government of this country decided that they would issue patents to individual Indians over portions of the reserved reservations, and if all of the land was not issued under eighty acre, as I recall, patents, then the reservations, despite the treaties, would be opened up for homesteading and allotment to White Men. That is the history; that happened.

From that time, assimilation or an assimilist philosophy existed to the point not too many years ago, I believe in the early '60's and late '50's, when the philosophy was one of termination; to-wit, terminate the reser-

vations, pay the Indians, the Members of the Yakima Indian Nation or other Indian Nations, the fair market value allegedly of their lands, terminate their dependent status and assimilate those individuals into the main stream of the dominate people.

Now, I believe, we have come full circle to the philosophy of sovereignty once again existing, or at least a recognition that the Indian Nations have retained some inherent sovereignty. But, the history of the conduct by the United States' Government is clearly evidenced by Exhibit No. 200. Exhibit No. 200 reflects exactly the history of the dealings by the United States' Government with the Indian People, the result being the factual situation with which I must deal; to-wit, a substantial portion of the Open Area of the Yakima Indian Nation being held in fee rather than being held in trust for the benefit of the peoples of the Yakima Indian Nation as was intended in the Treaty of 1855.

The witnesses who testified for the Nation have impressed me with their sincerity. They are absolutely and unequivocally sincere and honest in their beliefs that they are, in fact, as I believe Commissioner Tollefson suggested, stewards of the land, a philosophy somewhat different than those who have the commodity philosophy as suggested by Commissioner Tollefson. But I must resolve this matter not on the basis of what I think is fair; I am bound by the rule of law.

The Yakima Indian Nation, I believe, as part of their stewardship philosophy, adopted a zoning code for all of the land within the exterior boundaries of the reservation. The primary goal of that code was to preserve the agri-

cultural land in the open space area. I find that the goals of Yakima County are the same. I do not feel it is necessary for me, nor appropriate for me, to determine which code is better structured to attain the goals. My finding that they have common goals I believe is sufficient to be the basis for my determination in this case.

The two codes, the two philosophies of the Yakima Indian Nation and Yakima County are, in my opinion, consistent in policy and purpose. For the reasons which I have previously stated in my decision in Whiteside I, I find that Public Law 280 did not give the county exclusive zoning jurisdiction over deeded land within the exterior boundaries of the Yakima Indian Reservation. In my opinion, this case must be decided under the guidelines and following the teachings of *Montana v. United States.*

Montana v. United States, 450 U.S. 544, a 1980 decision of the United States Supreme Court, establishes the general principles which I feel control in this case. The bottom line, of course, is that which we have discussed throughout Whiteside II. While an Indian Tribe cannot exercise power which is inconsistent with their diminished status as sovereigns, on the other hand, a Tribe may and does retain the inherent power to exercise civil authority over the conduct of non-Indians on those non-Indians' fee lands within the exterior boundaries of the reservation when that non-Indian's conduct threatens or has some direct affect on the political integrity, the economic security, or the health or welfare of the Tribe. In making those determinations, I am bound by the fact that the inherent sovereignty retained by an Indian Nation, in this case the Yakima Indian Nation, is not unequivocal or unrestricted.

In *United States v. Wheeler,* 435 U.S. 313, the Court noted that Indian Tribes are "unique aggregations possessing attributes of sovereignty over both their members and their territory." That is the philosophy that was utilized in my opinion in Whiteside I. However, the *Wheeler* Court pointed out that despite those inherent attributes of sovereignty, "the Indians have lost many of the attributes of sovereignty." The *Wheeler* Court pointed out that there are certain areas where, "implicit divesture of sovereignty has been held to have occurred," as to the Tribe, and those include, "the relations between the Indian Tribe and non-members of the Tribe." The *Wheeler* Court pointed out that limitations upon the Tribe's sovereignty rests on the fact that there is a dependent status of Indian Tribes, and that that dependent status is necessarily inconsistent with the right of the Tribe to determine their external relations as opposed to the right of the Tribe to have its self-government, as has been pointed out to this Court by Mr. Hovis. That, of course, involves the relations of the Members of the Tribe among themselves.

In utilizing the *Montana* standards, I am not unmoved by the desire of the Tribe and the Members thereof to have its treaty lands returned to it, but that does not, in my opinion, justify my findings that such a desire constitutes a threat to the political integrity, the economic security, or the health or welfare of the Tribe and its Members.

The argument has been made that checkerboard zoning is either impossible or difficult to administer. I don't find that from the evidence. I find that of necessity, so-called checkerboard zoning or appropriate multi-jurisdiction zoning is required in today's society, whether it be

in the relations between counties and cities or towns, or between counties and Indian Tribes.

As is pointed out in the maority Opinion in the *State of Washington v. The Confederated Bands and Tribes of the Yakima Indian Reservation,* a case that counsel in this case argued before the United States Supreme Court, the lines that were drawn as a result of Public Law 280 may be difficult to administer, and there may be difficulties existing in the administration of the zoning code over the deeded land in this case, but the *Yakima Indian Nation* Court, the majority in the case, indicated that such classifications tend to pervade the law of Indian jurisdiction.

The *Washington v. Yakima Indian Nation* Court further found that checkerboard jurisdiction is not novel in Indian law and does not such violate the Constitution. I recognize that that is an analysis on a Constitutional basis as opposed to the *Moe* case that I discussed with counsel during the argument on the Motion to Dismiss.

I am unable to find that the desire, the sincere desire of the Tribe and its Members to have the deeded land restored to it is such as interferes with the political integrity, the economic security, or the health or welfare of the Tribe and its Members. Once again, that is a matter for the Legislative Branch, not the Judicial Branch to determine.

By reason of those findings, I find that there is no evidence whatsoever presented in this case to be the basis for a finding that the exercise by Yakima County of its zoning jurisdiction over the deeded land in the Open Area, would interfere with the political integrity, economic security, or health or welfare of the Tribe.

I am satisfied, even though the Tribe in this case feels that the Wilkinson Zone change may have been inappropriate, I am satisfied that the three members of the Yakima County Board of County Commissioners will give just and due consideration to the views of the Tribe and the Tribal Members in making its zoning decisions by reason of my findings which I have just made. I find that, in fact, Yakima County does have the exclusive jurisdiction over the zoning of the deeded land within the Open Area of the Yakima Indian Reservation.

I was impressed with the testimony of Commissioner Tollefson, and I assume that he represents the philosophy of the Board of County Commissioners. He is sensitive, in my opinion, to the views of the Members of the Yakima Indian Nation. I believe that the Board of County Commissioners and their agents, the Planning Director, Mr. Anderwald, are of a cooperative viewpoint. I sincerely believe that despite this Court's decision today, that Yakima County and the planning staff of Yakima County will give proper consideration to the viewpoints and the desires and goals of the Yakima Indian Nation as to the Open Area.

Zoning in and of itself is one of the most controversial things, I think Mr. Hovis spoke to this, and any of us who dealt in such matters through our legal careers recognize it as one of the most difficult areas of the law. Competing viewpoints always surface. One cannot but help to give due respect to county commissioners who are called upon to make many decisions, but the most difficult decisions in my experience are those involving zoning matters.

I suggest to the Yakima Indian Nation that despite your sincere belief that all of the land within the exterior boundaries should be returned in accordance with the Treaty of 1855, that that may be some time in coming. I think you recognize that that is a matter for the Legislative Branch of this Government to decide; to-wit, Congress. It involves funding and the competing interests for funding, and that inherent and sincere desire which you have should burn brightly in my opinion. But, while you should and will, I'm sure, retain that deep sense of commitment to accomplishing that end, in my judgment during the interim period, however long it may take, I would suggest to you that it is in the best interests of the Tribe in retaining that basic nature of the land that is the subject of this suit. It is in your best interests to participate and make your views known at any time a proposal comes to your attention that may be in any manner inconsistent with your truly held and firm beliefs.

Finally, that brings me to the challenge to the procedural aspect. I find that minimal due process is present in the notice operations and notice procedures followed by Yakima County in the giving of a notice to the appropriate planning agency of the Yakima Indian Nation. I think it is clear from the evidence that Yakima County does not have access to the true ownership rolls of trust property; the Yakima Indian Nation does, and it would seem to be appropriate in my opinion to have the Yakima Indian Nation then furnish the further notification to those functioned property owners as to any parcel that is being subjected to jurisdiction by Yakima County.

Having determined that Yakima County does, in fact, have exclusive jurisdiction over the deeded land in the

Open Area, it remains, of course, for the Court to consider the pendent claim under SEPA. I very seriously question whether it is appropriate for Federal Court to make a state court judgment, what I think should be a state court decision, on whether or not a county has complied with state laws. It is, of course, permitted for a Federal Judge to make that determination under the doctrine of pendent jurisdiction, which has been invoked in this case.

The trial briefs submitted to me have not addressed the SEPA claim, the pendent claim, I believe because it was recognized that the principle issue would be determined before the SEPA issue would be addressed. But, I assume now it would be appropriate to have a briefing period to address the SEPA claim.

How much time would you want on that, Mr. Hovis? As I read the Washington law and from my own experience, the matter is determined on the record.

MR. HOVIS: That's correct, your Honor. I'd like to have some time, your Honor, because of the press of other business, and I would like to have as much time as I can have. If I could have thirty days to get my brief in, I would appreciate it.

THE COURT: All right. I will permit that.

Counsel, I intend to sign the final orders in Whiteside I and Whiteside II on the same day; I think that is appropriate in case you wish to have the matter reviewed. Clearly, my findings are binding, as you recognize, on any appellate court, but there is, as Mr. Sullivan has clearly pointed out in his strenuous argument, the Public Law 280 argument, and I'm sure you'll have the countervailing ar-

guments in Whiteside II, but I think it is appropriate that I sign the final order on—even though I've decided these two cases now—the final order that would start the time running on any appellate process on the same day, because I'm sure these may well be cases—

MR. HOVIS: It would be well to be consolidated at least on the appeal basis for argument, your Honor.

THE COURT: We still have open the 1983 issue, at least as to attorney's fees in Whiteside I. I don't know what may be coming from the county as to the 1988 claim in Whiteside II, but I think it is appropriate that all these matters be finalized in one day.

I'll allow you thirty days, Mr. Hovis, and fifteen days to respond, because I'm sure you have addressed these matters before, Mr. Sullivan and Mr. Austin. You probably have your brief bank well prepared.

Are there any other matters that need to be decided today, or scheduling on these matters?

MR. HOVIS: I can't see any, your Honor.

THE COURT: Mr. Sullivan?

MR. SULLIVAN: I don't believe so, your Honor.

THE COURT: I want to compliment counsel. It's a real pleasure to try a case as difficult as this one is with the two experts, in my judgment, in the field of Indian law on these subjects; two attorneys who have had much, if not more experience in Indian law cases of any still

practicing today. I'm not trying to date either one of you gentlemen, but I do appreciate the job that's been done. It makes it enjoyable to try such cases, even though the decisions in these two cases were difficult, and I appreciate the job that you have done in these cases.

APPENDIX D

TREATY WITH THE YAKIMAS, 1855

12 Stat. 951, June 9, 1855—Treaty

Articles of agreement and convention made and concluded at the treaty ground, Camp Stevens, WallaWalla Valley, this ninth day of June, in the year one thousand eight hundred and fifty-five, by and between Isaac I. Stevens, Governor and Superintendent of Indian Affairs for the Territory of Washington, on the part of the United States, and the undersigned Head Chief, Chiefs, Headmen and Delegates of the Yakama, Palouse, Pisquose, Wentachapam, Klikatat, Klinquit, Kow-was-say-ee, Ki-ay-was, Skin-pah, Wishham, Shyiks, Oche-choetes, Kah-milt-pah, and Se-ap-cat, Confederatel Tribes and Bands of Indians occupying lands hereinafter bounded and described and lying in Washington Territory, who for the purposes of this treaty are to be considered as one nation, under the name of "Yakama," with Kamiakun as its Head Chief, on behalf of and acting for said tribes and bands, and being duly authorized thereto by them.

CESSION OF LANDS

ARTICLE 1. The aforesaid Confederated Tribes and Bands of Indians hereby cede, relinquish, and convey to the United States all their right, title, and interest in and to the lands and country occupied and claimed by them, and bounded and described as follows, to wit:

BOUNDARIES

Commencing at Mount Rainier, thence northerly along the main ridge of the Cascade Mountains to the point

where the northern tributaries of Lake Che-lan and the southern tributaries of the Methow River have their rise; thence southeasternly on the divide between the waters of Lake Che-lan and the Methow River to the Columbia River; thence, crossing the Columbia on a true east course, to a point whose longitude is one hundred and nineteen degrees and ten minutes (119°10′) which tow latter lines separate the above Confederated Tribes and Bands from the Oakinakane Tribe of Indians; then in a true south course to (952) forty-seventh (47°) parallel of latitude; thence east on said parallel to the Mail Palouse River, which two latter lines of boundary separate the above Confederated Tribes and Bands from the Spokanes; thence down the Palouse to its junction with the Mohhah-ne-she, or southern tributary of the same; thence, in a south-easterly direction, to the Snake River, at the mouth of the Tucannon River, separating the above Confederated Tribes from the Nez Perce Tribe of Indians; thence down the Snake River to its junction with the Columbia River; thence up the Columbia River to the "Big Island," between the mouths of the Umatilla River and Butler Creek; all of which latter boundaries separate the above Confederated Tribes and Bands from the Walla-Walla, Cayuse, and Umatilla Tribes and Bands of Indians; thence down the Columbia River to midway between the mouths of White Salmon and Wind Rivers; thence along the divide between said rivers to the main ridge of the Cascade Mountains; and thence along said ridge to the place of beginning.

RESERVATION

ARTICLE 2. There is, however, reserved from the lands above ceded for the use and occupation of the aforesaid Confederated Tribes and Bands of Indians, the tract of land included within the following boundaries to wit:

BOUNDARIES

Commencing on the Yakama River, at the mouth of the Attah-nam River; thence westerly along said Attah-nam River to the Forks, thence along the southern tributary to the Cascade Mountains; thence southerly along the main ridge of said mountains, passing south and east of Mount Adams, to the spur whence flows the waters of the Klickitat and Pisco Rivers; thence down said spur to the divide between the waters of said rivers; thence along said divide to the Columbia River; thence along said divide to the main Yakama, eight miles below the mouth of the Satass River; and thence up the Yakama River to the place of beginning.

All of which tract shall be set apart and, so far as necessary, surveyed and marked out, for the exclusive use and benefit of said Confederated Tribes and Bands of Indians, as an Indian Reservation; nor shall any white man, excepting those in the employment of the Indian Department, be permitted to reside upon the said reservation without permission of the tribe and the superintendent and agent. And the said Confederated Tribes and Bands agree to remove to, and settle upon the same within one year after ratification of this treaty. In the meantime it shall be lawful for them to reside upon any ground not in the actual claim and occupation of citizens of the United

States; and upon any ground claimed or occupied, if with the permission of the owner of claimant.

Guaranteeing, however, the right to all citizens of the United States, to enter upon and occupy as settlers any lands not actually occupied and cultivated by said Indians at this time, and not included in the reservation above named.

And provided, that any substantial improvements heretofore made by any Indian, such as fields enclosed and cultivated, and houses erected upon the lands hereby ceded, and which he may be compelled to abandon in consequence of this treaty, shall be valued, under the direction of the President of the United States, and payment made therefor in money; or improvements of an equal value made for said Indian upon the reservation. And no Indian will be required to abandon the improvements aforesaid, now occupied by him, until their value shall be furnished him as aforesaid.

ARTICLE 3. And provided that, if necessary for the public convenience, (953) roads may be run through the said reservation; and on the other hand, the right of way, with free access from the same to the nearest public highway, is secured to them; as also the right in common with citizens of the United States, to travel upon all public highways.

PRIVILEGES SECURED TO INDIANS

The exclusive right of taking fish in all the streams, where running through or bordering said reservations, is further secured to said Confederated Tribes and Bands of Indians, as also the right of taking fish at all usual and

accustomed places, in common with citizens of the territory, and of erecting temporary buildings for curing them; together with the privilege of hunting, gathering roots and berries, and pasturing their horses and cattle upon open and unclaimed land.

PAYMENT BY THE UNITED STATES

ARTICLE 4, In consideration of the above cession, the United States agree to pay to the said Confederated Tribes and Bands of Indians in addition to the goods and provisions distributed to them at the time of signing this treaty, the sum of two hundred thousand dollars, in the following manner, that is to say: sixty thousand, to be expended under the direction of the President of the United States, the first year after the ratification of this treaty, in providing for their removal to the reservation, breaking up and fencing farms, building houses for them, supplying them with provisions and suitable outfit, and for such other objects as he may deem necessary, and the remainder in annuities, as follows: for the first five years after the ratification of the treaty, ten thousand dollars each year, commencing September first, 1856; for the next five years, eight thousand dollars per year; and for the next five years, four thousand dollars per year.

All which sums of money shall be applied to the use and benefits of said Indians, under the direction of the President of the United States, who may from time to time determine at his discretion, upon what beneficial objects to expend the same for them. And the superintendent of Indian Affairs, or other proper officer, shall each year inform the President of the wishes of the Indians in relation thereto.

UNITED STATES TO ESTABLISH SCHOOLS

ARTICLE 5. The United States further agree to establish at suitable points within said reservation, within one year after the ratification hereof, two schools, erecting the necessary buildings, keeping them in repair, and providing them with furniture, books, and stationery, one of which shall be an agricultural and industrial school, to be located at the agency, and to be free to the children of the said Confederated Tribes and Bands of Indians, and to employ one superintendent of teaching and two teachers; to build two blacksmiths' shops, to one of which shall be attached a tin shop, and to the other a gunsmith's shop; one carpenter's shop, one wagon and ploughmaker's shop, and to keep the same in repair and furnished with the necessary tools; to employ one superintendent of farming and two farmers, two blacksmiths, one tinner, one gunsmith, one carpenter, one wagon and ploughmaker, for the instruction of the Indians in trades and to assist in the same; to erect one saw-mill and one flouring-mill, keeping the same in repair and furnished with the necessary tools and fixtures; to erect a hospital, keeping the same in repair and provide with the necessary medicines and furniture, and to employ a physician; and to erect, keep in repair, and provided with the necessary furniture, the buildings required for the accommodation of the said employees. The said buildings and establishments to be maintained and kept in repair as aforesaid, and the employees to be kept in service for the period of twenty years.

And in view of the fact that the head chief of the said Confederated Tribes and Bands of Indians is expected,

and will be called upon, to perform many services of a public character, occupying much of his time, the United States further agrees to pay to the said Confederated Tribes and Bands of Indians five hundred dollars per year, for the term of twenty years after the ratification hereof, as salary for such person as the said (954) Confederated Tribes and Bands of Indians may select to be their Head Chief; to build for him at a suitable point on the reservation a comfortable house and properly furnish the same, and to plough and fence ten acres of land. The said salary to be paid to, and the said house to be occupied by, such Head Chief so long as he may continue to hold that office.

KAMAIAKUN IS THE HEAD CHIEF

And it is distinctly understood and agreed that at the time of the conclusion of this treaty Kamaiakun is the duly elected and authorized Head Chief of the Confederated Tribes and Bands aforesaid, styled the Yakama Nation, and is recognized as such by them and by the commissioners on the part of the United States holding this treaty; and all the expenditures and expenses contemplated in this article of this treaty shall be defrayed by the United States, and shall not be deducted from the annuities agreed to be paid to said Confederated Tribes and Bands of Indians. Nor shall the cost of transporting the goods for the annuity payments be charged upon the annuities, but shall be defrayed by the United States.

RESERVATION MAY BE SURVEYED

ARTICLE 6. The President may, from time to time, at This discretion, cause the whole or such portions of

such reservation as he may think proper, to be surveyed into lots, and assign the same to such individuals or families of the said Confederated Tribes and Bands of Indians as are willing to avail themselves of the privilege, and will locate on the same as a permanent home, on the same terms and subject to the same regulations as are provided in the sixth article of the Treaty with the Omahas, so far as the same may be applicable.

ANNUITIES NOT TO PAY DEBTS OF INDIVIDUALS

ARTICLE 7. The annuities of the aforesaid Confederated Tribes and Bands of Indians shall not be taken to pay the debts of individuals.

ARTICLE 8. The aforesaid Confederated Tribes and Bands of Indians acknowledge their dependence upon the government of the United States, and promise to be friendly with all citizens thereof, and pledge themselves to commit no depredations upon the property of such citizens.

And should any one or more of them violate this pledge, and the fact be satisfactorily proved before the agent, the property taken shall be returned, or in default thereof, or if injured or destroyed compensation may be made by the government out of the annuities.

NOT TO MAKE WAR BUT IN SELF DEFENSE

Nor will they make war upon any other tribe, except in self-defense, but will submit all matters of differences between them and other Indians to the government of the United States or its agent for decision, and abide thereby. And if any of the said Indians commit depredations on

any other Indians within the Territory of Washington or Oregon, the same rule shall prevail as that provided in this article in case of depredations against citizens. And the said Confederated Tribes and Bands of Indians agree not to shelter or conceal offenders against the laws of the United States, but to deliver them up to the authorities for trial.

ARTICLE 9. The said Confederated Tribes and Bands of Indians desire to exclude from their reservation the use of ardent spirits, and to prevent their people from drinking the same, and, therefore, it is provided that any Indian belonging to said Confederated Tribes and Bands of Indians, who is guilty of bringing liquor into said reservation, or who drinks liquor, may have his or her annuities withheld from him or her for such time as the President may determine.

WENATSHAPAM FISHERY RESERVED

ARTICLE 10. And provided, that there is also reserved and set apart from the lands ceded by this treaty, for the use and benefit of the aforesaid Confederated Tribes and Bands, a tract of land not exceeding in quantity one township of six miles square, situated at the forks of the Pisquose or Wenatshapam River, and known as the "Wenatshapam Fishery," which said reservation shall be surveyed and marked out whenever the President may direct, and be subject to the same provisions and restrictions as other Indian Reservations.

WHEN TREATY TO TAKE EFFECT

ARTICLE 11. This treaty shall be obligatory upon the contracting parties as soon as the same shall be ratified by the President and Senate of the United States.

(955) In testimony whereof, the said Isaac I. Stevens, Governor and Superintendent of Indian Affairs for the Territory of Washington, and the undersigned Head Chief, Chiefs, Headmen, and delegates to the aforesaid Confederated Tribes and Bands of Indians, have hereunto set their hands and seals, at the place and on the day and year hereinbefore written.

Isaac I. Stevens
Governor and Superintendent
Kamaiakun
His X mark
Skloom
His X mark
Owhi
His X mark
Te-cole-kun
His X mark
La-hoom
His X mark
Me-ni-nock
His X mark
Elit Palmer
His X mark
Wish-oh-kmpits
His X mark
Koo-lat-toos
His X mark
Shee-ah-cotte
His X mark

Tuck-quille
His X mark
Ka-loo-as
His X mark
Scha-noo-a
His X mark
Sla-kish
His X mark

Signed and sealed in presence of:

James Doty
Secretary of Treaties
Mie. Cles (Jean Charles)
Pandosy
O.M.I.
Wm. C. McKay
W. H. Tappan
Sub Indian Agent, W.T.
C. Chirouse
O.M.I.
Patrick McKenzie
Intrepreter
A. D. Pamburn (Pambrun)
Intrepreter
Joel Palmer
Supt. of Indian Affairs, O.T.
W. D. Biglow
A. D. Pamburn (Pambrun)
Intrepreter

And whereas, the said treaty having been submitted to the Senate of the United States for its constitutional action thereon, the said Senate did, on the eighth day of March, one thousand eight hundred and fifty-nine, advise

and consent to the ratification of the same by a resolution in the words and figures following, to wit:

"IN EXECUTIVE SESSION"
SENATE OF
THE UNITED STATES
March 8, 1859

"Resolved, (two thirds of the senators present concurring), that the Senate advise and consent to the ratification of treaty between the United States and the Head Chief, Chiefs, Headmen, and delegates of the Yakima, Palouse, and other Confederated Tribes and Bands of Indians, occupying lands laying in Washington Territory, who, for the purpose of this treaty, are to be considered as one nation, under the name of "Yakima," with Kamaiakun as its Head Chief, signed 9th June, 1855.

Attest:

"Asbury Dickens, Secretary."

Now, therefore, be it known that I, James Buchanan, President of the United States of America, do, in pursuance of the advice and consent of the Senate, as expressed in their resolution of March eighth, one thousand eight hundred and fifty-nine, accept, ratify, and confirm the said treaty.

(956) In testimony whereof, I have hereunto caused the seal of the United States to be affixed, and have signed the same with my hand.

Done at the City of Washington, this eighteenth day of April, in the year of our Lord one thousand eight hun-

dred and fifty-nine, and of the independence of the United States the eighty-third.

James Buchanan

By the President:

Lewis Cass, Secretary of State